83-383

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

THE STATE OF FLORIDA,

Petitioner,

vs.

SUZANNE DECONINGH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

AND APPENDIX

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QUESTION PRESENTED

WHETHER THE FLORIDA SUPREME COURT MISAPPREHENDED THE SCOPE OF BLACKBURN V. ALABAMA, 361 U.S. 199, 80 S.CT. 274, 4 L.ED.2D 242 AND BRADY V. UNITED STATES, 397 U.S. 742, 90 S.CT. 1463, 25 L.ED.2D 747 (1970) WHEN IT HELD THAT THE STATEMENT MADE BY THE DEFENDANT WAS INVOLUNTARY EVEN THOUGH THE EVIDENCE CONCLUSIVELY ESTABLISHED THAT ALTHOUGH THE DEFENDANT WAS UNABLE TO UNDERSTAND THE CONSEQUENCES OF HER STATEMENT SHE NEVERTHELESS WANTED TO MAKE ONE AND HER DESIRE IN THIS REGARD WAS NOT INDUCED BY ANY IMPROPER POLICE ACTION?

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PREFACE

The Petitioner, The State of Florida was the Respondent in the Supreme Court of Florida, the Appellant in the District Court of Appeal of Florida, Third District and the prosecution in the Florida trial court. The Respondent, Suzanne DeConingh, was the Petitioner in the Supreme Court of Florida, the Appellee in the District Court and the Defendant in the trial court. In this brief, the parties will be referred to as the State and the defendant.

The following reference is made in this brief:

(A) For the portions of the record below sufficient to show jurisdiction in this Court, which are contained in the Petitioner's Appendix and consists of pages A1-A206.

I

OPINIONS BELOW

The decision of the Florida Supreme Court quashing the decision of the District Court of Florida, Third District and reinstating the trial ruling is reported at DeConingh v. State, 433 So.2d 501 (Fla. 1983). The opinion of the District Court reversing the trial court's ruling is reported at State v. DeConingh, 400 So.2d 998 (Fla. 3d DCA 1981).

II

JURISDICTION

On July 8, 1983, the Supreme Court of Florida denied the State's timely motion for rehearing of its decision announced on April 21, 1983. This petition for certiorari was filed within the applicable time period. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

III

CONSTITUTIONAL PROVISIONS

Amendment V of the Constitution of the United States provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV, Section 1 of the Constitution of the United States provides that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law

which shall abridge the privileges or immunities of citizxens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IV

STATEMENT OF THE CASE

The defendant was charged by information with second degree murder. The defendant filed a motion to suppress statements, which resulted in a hearing on May 8, 1980. The following testimony was produced at the hearing.

Following the alleged homicide of her husband, the defendant was admitted to the hospital on September 30, 1978, by her personal doctor because of hysteria. (A. 63, 128). She was not under arrest or a prisoner of the police department while in the hospital. (A. 85, 86). While in the hospital, the defendant stayed in a comfortable, semi-private, well lit air conditioned room. (A. 87, 88).

Police Officer Richard Roth, a friend of the defendant's, visited her in the hospital around lunchtime on October 2, 1978, in the hope of ascertaining what happened. (A. 62, 64, 65). Officer Roth went to see the defendant in his capacity as a police officer, and not as a friend. (A. 93, 172). Also present in the defendant's room at this time were Sergeant Gregory, Joe Pierce and Dr. Rice. (A. 63). Officer Roth found the defendant to be visibly upset, and somewhat incoherent but not to the point where she didn't realize what she was saying. (A. 65, 73, 74).

Officer Roth told the defendant he wanted to know what happened, and probably that things will work out, and gave her an advise of rights form. (A. 66, 67, 99). The defendant did not ask to have any of her rights explained. (A. 68) She

read the form, signed it, and when asked by Officer Roth if she understood it, she replied that she did. (A. 68, 69). Officer Roth felt that the defendant was able to carry on an intelligent conversation, and was able to understand what he was saying, and what was happening around her. (A. 73, 76). The defendant said that she wanted to get this over with. (A.74).

The defendant started to give a tape recorded statement when Joe Pierce suggested that she wait for an attorney. (A. 71). Although the defendant did not think that she needed an attorney, Officer Roth stopped the statement, and waited for the defendant's attorneys to arrive. (A. 71, 72). When the defendant's attorneys, Ralph Cunningham and Pete Lenzi, arrived they said that they would like to speak to the defendant

alone, so Officer Roth and Sergeant Gregory left the room. (A. 77). Although her attorneys then advised her that she should not say anything, the defendant insisted that she wanted to tell Officer Roth what happened because she did not want him to think bad of her. (A. 156-158 169). At this point the defendant was so upset that her attorneys arranged to have her sedated. (A. 157). The defendant's attorneys then told Officer Roth that the defendant could not give a statement at that time, but that he could come back at later date and take her statement.(A. 77, 169). Officer Roth said fine, and left. (A. 77). His entire visit with the defendant on October 2 lasted for about fifteen minutes. (A. 64).

Officer Roth came back to the hospital room at 11:10 a.m. on October 4, 1978. (A. 77, 78). Also present were

Sergeant Gregory, Robert Gregory, Joe Pierce, Dr. Mankowitz and the defendant's attorneys. (A. 78). Prior to Officer Roth's arrival, the defendant's attorneys has ascertained that the defendant could not understand the consequences of making a statement, and had accordingly advised her not to make one. (A. 160-162, 175). The defendant, however, overrode her attorneys advice, and insisted on making a statement. (A. 158, 161, 164, 171).

Officer Roth showed the defendant the waiver of rights form, which she had signed two days previously, and ascertained that she knew that it was still in effect. (A. 78, 79). He then told her that he was there to take a statement about what happened. (A. 78, 79). The defendant replied, "I want to get this over with. I want to give a statement.

I want to get it finished with." (A. 89). The defendant's attorneys told Officer Roth that he should let the defendant give a narrative and not ask any questions, and Officer Roth agreed. (A. 89). With her attorneys present, the defendant then gave the narrative tape recorded statement, which is the subject of her motion to suppress. (A. 90, 91, 169-172). While making the statement, the defendant would stop and cry on several occasions. (A. 97, 151, 170) At one point Officer Roth asked her if she wanted to postpone the statement to a later date, but she refused. (A. 170). The defendant was not promised anything or threatened in anyway in order to get her to make a statement. (A. 92, 94).

In addition to Officer Roth, Mr. Cunningham and Mr. Lenzi, the only other witness to testify at the suppression hearing was Sema McAninch, who has a

masters in counseling. (A. 101, 125). According to Ms. McAninch, who treated the defendant while she was in the hospital, the defendant from the time she shot her husband on September 30, 1978, through at least October 4, 1978, was disoriented, irrational, unable to think logically, sometimes would lose touch with herself and her environment, and was being treated with thorazine, a major tranquilizer, which would make her very sleepy and groggy. (A. 103-111, 120, 121, 124). Ms. McAninch was not present when the defendant gave her statement to Officer Roth. (A. 138).

After the testimony was concluded, defense counsel argued that the defendant's statement should be suppressed because they were taken in violation of Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966). (A. 176-

187), and because the defendant lacked the mental capacity to make a voluntary statement.[1] (A. 192-195)

In his written order granting the motion to suppress, the trial judge made the following legal and factual conclusions:

> 1. The death of the victim occured on September 30, 1978, and the defendant herein, the victim's wife, was hospitalized soon thereafter. A deputy sheriff of the Monroe County Sheriff's Department, hereinafter referred to as deputy, not in uniform and who was personally acquainted with the defendant, went to see the defendant at the hospital on October 2nd, and upon approaching her, addressed the defendant by her first name. The deputy testified that he did not read her her rights from his Miranda card, nor did he verbally advise her of her Miranda rights; but, instead, he gave her a so-called "advise of rights" form; he testified that she read it, signed it, and said she understood it. Admittedly, the deputy made no attempt whatsoever to ascertain if the defendant did in fact understand what she read, did in fact understand what she

[1] During argument, defense counsel made it clear that the only statement in issue was the one made on October 4. (A. 177-183).

signed, or whether she understood the consequences of giving a statement. No statement was taken at this time. The said "advice of rights" form was not of- fered in evidence and this Court is unaware of its contents.

2. On October 4, 1978, the same deputy again went to the hospital to interrogate the defendant, and this time her attorneys were present. Defendant's attorneys admitted they did not advise her of her rights or the consequences of giving a statement, but merely told her that she did not have to give a statement and that she should not. Again, the deputy testified that he did not advise her of her rights; but, instead, he indicated to her the "advice of rights" form signed by her two days previously, and stated did she know it was still in effect, to which she replied yes. Again the deputy did not advise the defendant of her rights, neither from the Miranda card, nor verbally, nor by reading her the "advice of rights" form; again no effort was made to ascertain whether or not she even remembered what was on the "advice of rights" form and whether or not she understood the consequences of giving the deputy a

statement. A statement was taken from the defendant on this occasion.

3. The testimony of the witnesses indicates that on both October 2nd and October 4th, as well as at other times, the defendant's condition was described as upset, crying, confused, disoriented, at times catatonic, not rational, under medications of thorazine and valium, and hysterical.

4. On October 2, 1978 and on October 4, 1978, the defendant was not properly advised of her constitutional rights; the defendant did not understand her constitutional rights; the defendant did not waive her constitutional rights; and, that the defendant was so emotionally upset or distressed, and of such an irrational state of mind that any statements given or made on either of those two occasions were not made voluntarily or knowledgably or with a full understanding of the consequences of making any such statement. Such statements, therefore, must be suppressed. (A. 55-58).

On direct appeal the District Court of Appeal, Third District, with Judge Henry dissenting first held that there was no Miranda violation since the

defendant had not been subjected to custodial interrogation. The court then turned its attention to the ". . .question of voluntariness which on the facts of this case must be considered on general due process grounds as distinct from the issue of waiver". State v. DeConingh, 400 So.2d 998, 1001 (Fla. 3d DCA 1981). The court noted that this inquiry raises a federal question under the Fifth and Fourteenth Amendments to the United States Constitution. The court held that since the defendant's statements were not obtained through coercion, they were voluntary, despite the defendant's diminished mental state, and should not have been suppressed.

In its opinion reversing the district court, the Florida Supreme Court, with Justices Alderman and Ehrlich dissenting, initially noted that its

decision was not based on the Miranda issue but rather on the voluntariness issue. In finding that the defendant's statement was not voluntary, the court relied mostheavily on this Court's decision in Blackburn v. Alabama, 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960). The court quoted from Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1436, 1468, 25 L.Ed.2d 747 (1970) the proposition that "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." DeConingh v. State, 433 So.2d 501, 503 (Fla. 1983). The court held that the testimony at the suppression hearing shows that the defendant"... did not meet this test regarding her right under the state and federal constitutions to remain silent. Id. at 503.

V

SUMMARY OF ARGUMENT

The Florida Supreme Court's holding that the defendant's statement was involuntary is based upon a misapprehension of the scope of Blackburn v. Alabama, 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960) and Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). Contrary to the Florida Supreme Court's apparent reading of these cases, they do not require as a sine qua non to a voluntary statement that it be given by a person capable of understanding the consequences of her statement. Rather, they as well as other cases from this Court, recognize that a statement is voluntary unless produced by coercion, which is not present in this case.

VI

ARGUMENT

As the Florida Supreme Court makes clear, its decision to reinstate the ruling granting the defendant's motion to suppress it based on its finding that the defendant's statement was involuntary, and does not turn on whether the defendant was able to understand her Miranda rights. In finding that the statement was voluntary, the court placed its primary reliance on Blackburn v. Alabama, 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960) and Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). The State submits that the court misapprehended the scope of Blackburn and Brady, and this Court should accordingly grant certiorari. See Schlude v. Commissioner of Internal Revenue, 372 U.S. 128, 83 S.Ct. 601, 9 L.Ed.2d 633 (1963).

In its opinion, the Florida Supreme Court quotes the following three passages from Blackburn v. Alabama, supra at 361 U.S. 206, 207.

> As important as it is that persons who have committed crimes be convicted, there are considerations which transcend the question of guilt or innocence. Thus, in cases involving involuntary confessions, this Court enforces the strongly felt attitude of our society that important human values are sacrified where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will.
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> * * *
>
> "The abhorrence of society to the use of involuntary confessions. . . also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves."
>
> * * *
>
> [S]urely in the present stage of our civilization a most basic sense of justice is affronted by the spectacle of incarcerating a human

> being upon the basis of a statement he made while insane; and this judgment can without difficulty be articulated in terms of the unreliability of the confession, the lack of rational choice of the accused, or simply a strong conviction that our system of law enforcement should not operate so as to take advantage of a person in this fashion.

DeConingh v. State, 433 So.2d 501, 502 (Fla. 1983).

When these passages are taken out of context, as the Florida Supreme Court has done, they arguably support the proposition that an insane person is incapable of making a voluntary statement.[2] When, however, the entire opinion in Blackburn, as well as subsequent cases from this

[2]The State would concede at this point that there was testimony to support the trial court's factual finding that the defendant on the day she made the statement was "upset, crying, confused, disoriented, at times catatonic, not rational, under medication of thorazine and valium and hysterical, (A.57,58), and that she could not understand the consequences of making statement. (A.160-162, 175).

Court are analyzed, it becomes apparent that such a proposition is incorrect, and that the Florida Supreme Court misapplied Blackburn.

As recognized in Blackburn, a confession is involuntary only if obtained through coercion. The significance of Blackburn's insanity is that it established a setting in which his will could be easily overcome. Procunier v. Atchley, 400 U.S. 446, 91 S.Ct. 485, 27 L.Ed.2d 524 (1971). Therefore, in Blackburn the eight-to-nine hour sustained interrogation in a tiny room which was upon occasion literally filled with police officers; the absence of Blackburn's friends, relatives or legal counsel; and the composition of the confession by a Deputy Sheriff rather than by Blackburn, were sufficiently coercive circumstances to

wring a confession out of an insane suspect against his will.

As this Court has often stated, a confession is voluntary unless "extracted by any sort of threats or violence, or obtained by any direct or implied promises, however slight, or by the exertion of any improper influence." Hutto v. Ross, 429 U.S. 28, 30, 97 S.Ct. 202, 203, 50 L.Ed.2d 194 (1976); Brady v. United States, supra, (397 U.S. at 753). A suspect's diminished mental state can never therefore be the sole basis for finding that a confession is involuntary, but rather is "relevant only in establishing a setting in which actual coercion might have been expected to overcome the will of the suspect." Procunier v. Atchley, supra, (400 U.S. at 453, 454). cf. Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978). These principles

are concisely summed up in the Court's statement in Lego v. Twomey, 404 U.S. 477, 484 N. 12, 92 S.Ct. 619, 624, 30 L.Ed.2d 618 (1972) that "the sole issue in such a hearing (voluntariness of a confession) is whether a confession was coerced."

When Blackburn is read in light of this Court's other decisions on voluntariness of confessions its scope becomes readily apparent. A police officer may not take advantage of an insane person by subjecting him to custodial interrogation so as to obtain a confession which he would not give on his own volition. Blackburn cannot be read as support for the proposition that a law enforcement officer may not take the confession of an insane person if the desire to confess is not produced by police action; and in citing Blackburn for support of such a

proposition, the Florida Supreme Court has misapprehended the scope of that opinion.

The Florida Supreme Court also misapplied Brady v. United States, supra when it quoted from 397 U.S. at 748. "Waiver of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. DeConingh v. State, supra at 503. Since Miranda was expressly inapplicable to its decisions, this quotation of Brady by the Florida Supreme Court could only mean that the Court felt that for a confession to be voluntary it must be made with a sufficient awareness of the relevant circumstances and likely consequences. It is manifest that Brady does not stand for such a proposition.

Brady is concerned with the requirements for the acceptance of a guilty plea, and holds that since a guilty plea is foremost an admission of guilt it must be a voluntary expression of a defendant's own choice under the Fifth Amendment. The Court then holds that since a guilty plea, in addition to being an admission of guilt, is also a waiver of constitutional rights, it must be made knowingly. Later when the Court discusses the requirements of a voluntary confession it reiterates the aforemention view that a voluntary confession must not by extracted by any improper influences, but omits any requirement that it be made knowingly, i.e. with an awareness of the consequences. It is thus clear that the Florida Supreme Court, in relying upon Brady, has misapprehended its scope.

A review of the evidence in this case demonstrates that the Florida Supreme Court must have felt that a statement given by a suspect incapable of understanding the consequences of her statement is involuntary in and of itself, since there is no evidence that the defendant was coerced; but rather the evidence conclusively establishes that the defendant wanted to make a statement.

When Officer Roth first met with the defendant on October 2, 1978, another officer, a doctor and the defendant's friend were also present. (A. 63). The defendant was advised of her rights, which she said she understood.(A.67-69) She then agreed to give a statement to Officer Roth. (A.74). When she began her statement, she was stopped by Joe Pierce, her friend, who suggested that she wait for her attorneys. (A. 71). Although the

defendant replied that she didn't think she needed an attorney, Officer Roth nevertheless stopped the statement and waited for the defendant's attorneys to arrive. (A. 71, 72) When the defendant's attorneys arrived, they spoke to the defendant outside Officer Roth's presence; and she told them that she wanted to tell Officer Roth what happened because she did not want him to think bad of her, despite their advice not to say anything. (A. 156-158, 169) Officer Roth was then advised that he could come back at a later date and take the defendant's statment, and he left. (A. 77,169).

Prior to making her statement in issue to Officer Roth two days later, the defendant had numerous discussions with her attorneys in which she persistently and emphatically maintained that she wanted to make a statement despite her

attorneys advice to the contrary. (A.158-164, 171, 175) Thus, when Officer Roth returned to the hospital, he was advised by the defendant's attorneys that the defendant would give a narrative and he was not to ask any question. (A. 89). Officer Roth agreed, and the defendant, with her attorneys present, gave a narrative tape recorded statement. (A. 90, 91, 169-172). While making the statement, the defendant would stop and cry on several occasions, but she refused to postpone the statement despite Officer Roth's offer to do so. (A. 97,151,170).

In this case it was conclusively established that the defendant wanted to make a statement, and this desire was not induced by any improper police action. In the absence of any police action amounting to coercion the confession was voluntary. Stroble v. California, 343

U.S. 181, 72 S.Ct. 599, 96 L.Ed.2d 872 (1952).

The State submits that this case is of sufficient importance to warrant the granting of certiorari. As the six to four split among appellate judges indicates it obviously involves a question for which there is no definitive guidance. If the Florida Supreme Court's decision is allowed to stand, law enforcement authorities in Florida would be under the erroneous impression that this Court forbids the taking of a confession from a mentally deficient suspect even though the suspect clearly wants to confess. Moreover, courts in other jurisdiction might well take the denial of certiorari in this case as an indication that the Florida Supreme Court has not misapplied this Court's decisions and therefore reach the same erroneous

holding. In order to guard against the unjustified erosion of a law enforcement officer's authority to effectively investigate crimes, this Court should take jurisdiction and correct the Florida Supreme Court's erroneous opinion.

VII

CONCLUSION

In finding that the defendant's statement was involuntary under the federal constitution, the Florida Supreme Court misapplied this Court's decisions in Blackburn v. Alabama, 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960) and Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). These decisions, as well as other decisions from this Court, require that a confession be held voluntary, unless obtained through coercion. Since there was no coercion exerted on the defendant to make her give a statement, her statement was voluntary. The likelihood that the question presented by this case will be confronted by law enforcement authorities and judges

not only in Florida, but throughout the country, justifies the granting of certiorari.

Respectfully submitted,

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INDEX

SUZANNE DeCONINGH, Petitioner,

vs.

STATE OF FLORIDA, Respondent.

No. 61008

SUPREME COURT OF FLORIDA

April 21, 1983

Rehearing Denied July 8, 1983.

State appealed from ruling of the Circuit Court, Monroe County, Helio Gomez, J., granting motion of defendant to suppress statements made by defendant when she was hospitalized shortly after shooting death of her husband. The District Court of Appeal, 400 So.2d 998 reversed and remanded, and defendant applied for review. The Supreme Court, McDonald, J. held that statement defendant made while in hospital to deputy who was personal friend was neither knowing nor voluntary.

District court's opinion quashed with directions to reinstate trial court's ruling.

Alderman, C.J., dissented with opinion in which Ehrlich, J., concurred.

1. Criminal Law - 517.1(2)

To be admissible, state must show confession to have been voluntary.

2. Criminal Law - 531(3)

Standard for admissibility of confession is establishing by preponderance of evidence that confession was freely and voluntarily made.

3. Criminal Law - 517.2(3)

Where deputy gave defendant advice of rights form without reading it to her and without making any effort to determine if she understood it, came into her room with another deputy prepared with tape recorder, and defendant had obvious respect for deputy, who was personal

friend, and was concerned over what he thought of her, defendant's statement made to deputy was neither knowing nor voluntary.

4. Criminal Law - 1141(1)

Trial court ruling comes to reviewing court with the same presumption of correctness that attaches to jury verdicts and final judgments.

5. Criminal Law - 1158(1)

Reviewing court should defer to fact finding authority of trial court and should not substitute its judgment for that of trial court.

Kurt Marmar, Coral Gables, for petitioner. Jim Smith, Atty.Gen. and Paul Mendelson, Asst.Atty.Gen., Miami, for respondent.

McDONALD, Justice.

We granted review of State v. DeConingh, 400 So.2d 998 (Fla. 3d DCA

1981), because of conflict with Reddish v. State, 167 So.2d 858 (Fla. 1964). We have jurisdiction, article V, section 3(b)(3), Florida Constitution, and quash DeConingh.

A prive physician hospitalized DeConingh shortly after she shot and killed her husband. The doctor diagnosed her as having lost touch with herself and with reality and treated her with thorazine and valium. A deputy sheriff, who happened to be a friend, visited her in the hospital, asked her to sign an "advice of rights" form, and then asked her what had happened. When her attorneys arrived, the deputy agreed to leave and come back another time. He returned two days later, and against her attorneys' advice, DeConingh, insisting that the deputy was her friend and that she could not let him think badly of her,

gave a narrative statement of what had happened.

The trial court suppressed the statement, finding that: 1) the deputy did not inform DeConingh of her rights under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and made no attempt to ascertain if she understood the "advice of rights" form on either of his visits; 2) witnesses described DeConingh as upset, crying, confused, disoriented, under medication, and hysterical; and 3) DeConingh had not been properly advised of her rights, did not understand her rights, did not waive her rights, and did not make the statement voluntarily or knowingly. The district court reversed the suppression ruling, holding that Miranda did not apply because DeConingh had not been in custody and that the statement had been given voluntarily anyway. We base our

decision not on the Miranda issue but on the voluntariness issue. We therefore refrain from discussing the disputed issue of whether there was a duty to give DeConingh the standard Miranda warnings.[1]

[1,2] The United States Supreme Court discussed involuntary confessions at some length in Blackburn v. Alabama, 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960), and made the following observation:

> As important as it is that persons who have committed crimes be convicted, there are considerations which transcend the question of guilt or innocence. Thus, in cases involving involuntary confessions, this Court enforces the strongly felt attitude of our society that important human values are sacrified whee an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will.

[1]Cases discussing whether in-hospital questioning is custodial or noncustodial for Miranda purposes have been collected at Annot. 31 A.L.R.3d 565 §13 (1970).

Id. at 206-07, 80 S.Ct. at 279-80. The Court went on to quote from Spano v. New York, 360 U.S. 315, 320-21, 79 S.Ct. 1202, 1205-06, 3 L.Ed.2d 1265 (1959):

> "The abhorrence of society to the use of involuntary confessions. . . also turns on the deep-rooted feeling that the polie must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves."

361 U.S. at 207, 80 S.Ct. at 280. The Court found that the evidence showed, to a high probability, Blackburn's insanity and incompetency and commented that

> [s]urely in the present stage of our civilization a most basic sense of justice is affronted by the spectacle of incarcerating a human being upon the basis of a statement he made while insane; and this judgment can without difficulty be articulated in terms of the unreliability of the confession, the lack of rational choice of the accused, or simply a strong conviction that our system of law enforcement should not operate so as to take advantage of a person in this fashion.

Id. This Court echoed Blackburn in Reddish and stated:

> If for any reason a suspect is physically or mentally incapacitated to exercise a free will or to fully appreciate the significance of his admissions, his self-condemning statements should not be employed against him.

167 So.2d at 863 (emphasis added). To be admissible, the state must show a confession to have been voluntary. The state was required to establish voluntariness by a preponderance of the evidence. Brewer v. State, 386 So.2d 232 (Fla. 1980).

[3] The circumstances of this case--the deputy's giving DeConingh the advice of rights form without reading it to her and without making any effort to determine if she understood it, coming into her room with another deputy and prepared with a tape recorder, and DeConingh's obvious respect for the deputy personally and

concern over what he thought of her, when coupled with her incapacity due to the administration of powerful tranquilizers[2] and her distraught condition-add up to more than a mere admission to a disinterested party.[3] The deputy here took impermissible advantage of the situation, resulting in psychological coercion.

"Any questioning by police officers which in fact produces a confession which

[2]Intoxication at the time of confessing will not bar admitting a confession into evidence unless the confessor is intoxicated to the degree of mania or is unable to understand the meaning of his statements. Lindsey v. State, 66 Fla. 341, 63 So. 832 (1913); Annot. 69 A.L.R.2d 361 (1960). Such is not the case here, however, where the drug intoxication was not self-induced but was prescribed by her doctor.

[3]If DeConingh had been under arrest and if events had occurred exactly as they did in the hospital, the trial court would have had to make the primary determination as to voluntariness. McDole v. State, 283 So.2d 553 (Fla. 1973).

is not the product of a free intellect renders that confession inadmissible." Townsend v. Sain, 372 U.S. 293, 308, 83 S.Ct. 745, 754, 9 L.Ed.2d 770 (1963) (emphasis in original). There was a factual basis for the trial court to conclude that DeConingh's mental and emotional distress prevented her from effectively waiving her rights and that she did not make the statement voluntarily or knowingly. "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463, 1468, 25 L.Ed.2d 747 (1970)(footnote omitted). Testimony of the witnesses at the suppression hearing shows that DeConingh did not meet this test regarding her right under the state and federal constitutions

to remain silent. The strongest support finding a knowing, voluntary confession is the deputy's statement that, although she was crying and visibly upset, he thought that DeConingh understood her rights. This conclusion appears to be mere unsupported speculation when contrasted with the deputy's conduct and with the other witnesses' testimony.

The district court correctly concluded that, ordinarily, a confession which is the product of a confused mind presents an issue of credibility for the jury to determine rather than voluntariness which the court must rule on. The instant case, however, is not the ordinary case.[4] The trial court, in

[4]If this were the ordinary case, the district court's conclusion would probably be correct. As stated in Myles v. State, 399 So.2d 481, 482 (Fla. 3d DCA 1981):

spite of the actions of both the deputy and DeConingh, preserved her right not to be compelled to be a witness against

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Although mental capacity may be considered in determining whether under the totality of circumstances a confession is voluntary, State v. Chorpenning, 294 So.2d 54 (Fla. 2d DCA 1974), the lack of mental capacity is generally considered only as it relates to credibility and not admissibility, see e.g., Palmes v. State, 397 So.2d 648 (Fla. 1981); Reddish v. State, 167 So.2d 858 (Fla. 1964), and a confession will not be excluded on these grounds where it is shown that the defendant understands his rights, see e.g., Ashley v. State, 370 So.2d 1191 (Fla. 3d DCA 1979); Lane v. State, 353 So.2d 194 (Fla. 3d DCA 1977).

(Emphasis supplied) In the instant case, however, the State has failed to show that DeConingh really understood anything. The knowingly and voluntarily requirements for confessions are similar to the requirements for accepting a guilty plea. A guilty plea must be voluntary to ensure that that the plea is made of the

herself. Article I, §9, Fla.Const. We agree with Judge Hendry[5] that on the totality of the circumstances the trial court had a proper factual basis to find that DeConingh had made her statement neither knowingly nor voluntarily.[6]

[4,5] A trial court ruling comes to a reviewing court with the same presumption of correctness that attaches to jury verdicts and final judgments. Stone v. State, 378 So.2d 765 (Fla. 1979), cert. denied, 449 U.S. 986, 101 S.Ct. 407, 66 L.Ed.2d 250 (1980); Ebert v. State, 140 So.2d 63 (Fla. 2d DCA 1962). "The question of the admissibility in evidence of

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defendant's own free will without any kind of threats or coercion. Williams v. State, 316 So.2d 267 (Fla. 1975).

[5]State v. DeConingh, 400 So.2d at 1005 (Hendry, J. dissenting).

[6]Voluntariness must be determined from the totality of the circumstances. Brewer v. State, 386 So.2d 232 (Fla. 1980).

an extra-judicial confession is for the court to decide, based on all the circumstances of the confession." Palmes v. State, 397 So.2d 648, 653 (Fla.), cert. denied, 454 U.S. 882, 102 S.Ct. 369, 70 L.Ed.2d 195 (1981). A reviewing court should defer to the fact-finding authority of the trial court and should not substitute its judgment for that of the trial court. State v. Melendez, 392 So.2d 587 (Fla. 4th DCA 1981). Because the record supports the trial court's ruling, the district court impermissibly substituted its judgment for that of the trial court. The district court's opinion is quashed with directions to reinstate the trial court's ruling.

It is so ordered.

ADKINS, BOYD, OVERTON and SHAW, JJ., concur.

ALDERMAN, C.J., dissents with an opinion, in which EHRLICH, J., concurs.

ALDERMAN, Chief Justice, dissenting.

Initially, I dissent on the basis that we are without jurisdiction to review the decision of the Third District. The district court correctly determined that Reddish v. State is both of limited significance and inapplicable to the present case. I therefore would deny the petition for review.

Moreover, even if we had jurisdiction to review the district court's decision, I dissent from this Court's quashing of that decision.

The district court correctly held that Miranda v. Arizona, does not apply here because DeConingh was not in custody when she made her statements and that the statements sought to be suppressed were given voluntarily. DeConingh had not

been arrested and her questioning did not take place at a police station. She had been hospitalized on her personal physician's advice, and there is nothing in the record evidencing that her hospitalization amounted to a custodial situation. The district court accurately points out that her statements did not result from police interrogation but rather were blurted out in the form of a narrative and were voluntary. They were not the result of any threats, promises, or other physical or mental coercion caused by police procedure and, in fact, were given in the presence and against the advice of her attorney. She wanted to speak and in no way was she induced to do so.

I particularly object to the statement in the majority opinion that "[t]he deputy here took impermissible advantage of the situation, resulting in psychological coercion." The deputy to whom

DeConingh blurted out her statements did not employ any improper police procedure. In fact, this case represents an example of good police work, and the deputy should be commended for his actions.

The Third District Court properly reversed the trial court's order which grantaed DeConingh's motion to suppress, and I would approve its decision holding that DeConingh's statements were not the product of a coercive custodial interrogation and that the record establishes that the statements were voluntary.

EHRLICH, J., concurs.

THE STATE OF FLORIDA, Appellant,

vs.

SUZANNE DeCONINGH, Appellee.

No. 80-1061

District Court of Appeal of Florida, Third District

June 16, 1981

Rehearing Denied July 23, 1981.

State appealed from ruling of the Circuit Court, Monroe County, Helio Gomez, J., granting motion of defendant to suppress statements made by defendant when she was hospitalized shortly after shooting death of her husband. The District Court of Appeal, Ferguson, J., held that: (1) defendant, who was hospitalized on advice of her personal physician and who made statements to police officers in narrataive form, and not in response to interrogation, was not in custody and was not a person deprived of freedom in a significant way; thus, there

was no necessity for adhering to specific requirements of Miranda, and (2) defendant's statements to police officer, given in presence and against advice of her attorney and in a narrative form absent any threats, promises or other physical or mental coercion caused by police procedure, were voluntary.

Reversed and remanded.

Hendry, J., dissented and filed opinion.

1. Criminal Law - 412.1(3)

In determining whether statements of a defendant should be suppressed under Miranda, issues are whether there was custody, whether there was interrogation, whether warnings were given, and whether there was a waiver; a negative finding at any step makes proceeding to next step unnecessary. U.S.C.A. Const. Amend. 5.

2. Criminal Law - 412.2(2)

It is custodial nature and not focus of interrogation that triggers necessity for adhering to specific requirements of Miranda. U.S.C.A. Const. Amend. 5.

3. Fact that sheriff gave defendant, who had been hospitalized on the advice of her personal physician, an "advice of rights" form to read and sign while defendant was still in hospital did not convert an otherwise noncustodial situation into a custodial one. U.S.C.A.Const. Amend. 5.

4. Criminal Law - 412.2(2)

Where defendant, who was hospitalized on advice of her personal physician, gave statement to police officer, while in hospital, in narrative form and not in response to police interrogation, defendant was not in custody and it was not necessary to adhere to specific

requirements of Miranda U.S.C.A.Const. Amend. 5.

5. Criminal Law - 519(4)

Test of "voluntariness" of confession given to police is whether under totality of circumstances confession was product of mental or physical coercion, brutality or some other improper police procedure which caused confession to be involuntary. U.S.C.A. Const. Amend 5; West's F.S.A. Const. Art. 1, §9.

6. Criminal Law - 525, 526

Generally, a confession which is product of a mind confused by intoxication, excitement or mental disturbance not induced by extraneous pressure, raises question of credibility to be determined by jury and not a question of admissibility as a matter of law.

7. Criminal Law - 531(2)

Absent evidence of threats or promises or other improper police procedures

testimony about state of mind is irrelevant at pretrial hearing on motion to suppress confession.

8. Criminal Law - 519(4)

Confession given by defendant, who gave statements to deputy sheriff in presence of and against advice of her attorney and in a narrative form absent any threats, promises or other physical or mental coercion caused by police procedures, was voluntary. U.S.C.A. Const. Amends. 5, 14; West's F.S.A.Const. Art. 1, §9.

Jim Smith, Atty.Gen. and Paul Mendelson, Asst.Atty Gen., David H. Bludworth, State's Atty, West Palm Beach, for appellant.

Kurt Marmar, Miami, For appellee.

Before HENDRY, SCHWARTZ and FERGUSON, JJ.

FERGUSON, Judge.

The State appeals from a ruling of the trial court which granted the motion of Suzanne DeConingh to suppress statements made by her when she was hospitalized shortly after the shooting death of her husband. DeConingh was subsequently charged with second degree murder.[1]

We cite verbatim the findings made by the trial court in granting DeConingh's motion to suppress:

[1]A second appeal was filed by the state, seeking to overturn a separate judicial ruling as to the admissibility in evidence of certain blood samples taken from the defendant and/or certain physical evidence seized at the home of the victim and defendant where the shooting allegedly occurred. In our opinion in State v. DeConingh, 396 So.2d 858 (Fla. 3d DCA)(Case No. 80-1812, opinion filed April 14, 1981), this court affirmed the trial court's suppression of the blood sample evidence and dismissed the defendant's cross-appeal of the suppression of physical evidence seized in the home.

1. The death of the victim occurred on September 30, 1978, and the defendant herein, the victim's wife, was hospitalized soon thereafter. A deputy sheriff of the Monroe County Sheriff's Department, hereinafter referred to as deputy, not in uniform and who was personally acquainted with the defendant, went to see the defendant at the hospital on October 2nd, and upon approaching her, addressed the defendant by her first name. The deputy testifieds that he did not read her her rights from his Miranda card, nor did he verbally advise her of her Miranda rights; but, instead, he gave her a so called "advice of rights" form; he testified that she read it, signed it, and said she understood it. Admittedly, the deputy made no attempt whatsoever to ascertain if the defendant did in fact understood what she read, what she signed, or whether she understood the consequences of giving a statement. No statement was taken at this time. The said "advice of rights" form was not offered in evidence and this Court is unaware of its contents.

2. On October 4, 1978, the same deputy again went to the hospital

to interrogate the defendant, and this time her attorneys were present. Defendant's attorneys admitted they did not advise her of her rights or the consequences of giving a statement, but merely told her that she did not have to give a statement and that she should not. Again, the deputy testified that he did not advise her of her rights; but, instead, he indicated to her the "advice of rights" form signed by her two days previously, and stated did she know it was still in effect, to which she replied yes. Again the deputy did not advise the defendant of her rights, neither from the Miranda card, nor verbally, nor by reading her the "advice of rights" form; again no effort was made to ascertain whether or not she even remembered what was on the "advice of rights" form and whether or not she understood the consequences of giving the deputy a statement. A statement was taken from the defendant on this occasion.

3. The testimony of the witnesses indicates that on both October 2nd and October 4th, as well as at other times, the defendant's condition was described as upset, crying, confused, disoriented, at

> times catatonic, not rational, under medications of thorazine and valium, and hysterical.
>
> 4. On October 2, 1978 and on October 4, 1978, the defendant was not properly advised of her constitutional rights; the defendant did not understand her constitutional rights; the defendant did not waive her constitutional rights; and, that the defendant was so emotionally upset or distressed, and of such an irrational state of mind that any statements given or made on either of those two occasions were not made voluntarily or knowledgably or with a full understanding of the consequences of making any such statement. Such statements, therefore, must be suppressed.

We must reverse on the grounds that Miranda does not apply to non-custodial situations and that the statements sought to be suppressed were given voluntarily. [1] In Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the Supreme Court held that statements arising from the custodial interrogation of a defendant are inadmissible at trial unless the prosecution demonstrates that

the person giving the statements was informed that any statement he makes may be used against him and he has a right to the presence of an attorney, either retained or appointed. Custodial interrogation was defined as questioning initiated by a law enforcement officer after a person has been taken into custody or otherwise deprived of his freedom in any significant way. The court in Miranda, supra, also stated that a party may waive his right to remain silent, provided the waiver is knowingly and intelligently made. Miranda, supra, establishes a four part test for determining whether statements of a defendant should be suppressed: (a) was there custody, (b) if so, was there interrogation, (c) if so, were the warnings given, and (d) if so, was there a waiver. See, e.g., Cummings v. State, 27 Md.App. 361, A.2d 294 (1975). A negative finding at any step makes proceeding

to the next step unnecessary. See e.g. R.A.B. v. State, 399 So.2d 16 (Fla. 3d DCA 1981)(plaintiff failed to prove custody).

[2,3] DeConingh had been hospitalized on the advice of her personal physician and the record is devoid of facts establishing that hospitalization or questioning of DeConingh constituted a custodial situation. It is well established that Miranda does not apply outside the context of inherently coercive custodial interrogation (emphasis added), Roberts v. United States, 445 U.S. 552, 100 S.Ct. 1358, 63 L.Ed.2d 622 (1980); Oregon v. Mathiason, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977). See, e.g. In re Beverly, 342 So.2d 481, 488 (Fla. 1977). It is the custodial nature and not the focus of the interrogation that triggers the necessity for adhering to the specific requirements of Miranda, supra. See

e.g. Beckwith v. United States, 425 U.S. 341, 96 S.Ct. 1612, 48 L.Ed.2d 1 (1976); State v. Fields, 294 N.W.2d 404 (N.D. 1980); State v. Paschal, 358 So.2d 73 (Fla. 1st DCA 1978); Cummings v. State, supra.[2] The fact that Sheriff Roth gave DeConingh the "advice of rights" form to read does not convert an otherwise non-custodial situation into custodial one. United States v. Akin, 435 F.2d 1011 (5th Cir. 1970); United States v. Owens, 431 F.2d 349 (5th Cir. 1976).

[4] It is widely held that a general questioning by police officers in a hospital room does not constitute custodial questioning. See, e.g., State v. Fields, supra; State v. Alston, 295 N.C. 629, 247 S.E.2d 898 (1978); People v. Clark, 55 Ill.App. 3d 496, 13 Ill. Dec. 338, 371

[2]But see Johnson v. State, 252 Ark. 113, 482 S.W.2d 600 (1972).

N.E.2d 33 (1977); Bartram v. State, 33 Md.App. 115, 364 A.2d 1119 (1976), aff'd, 280 Md. 616, 374 A.2d 1144 (1977); Cummings v. State, supra; State v. Ryan, 113 R.I. 343, 321 A.2d 92 (1974); State v. Brunner, 211 Kan. 596, 507 P.2d 233 (1973); Johnson v. State, supra; State v. Hoskins, 292 Minn. 111, 193 N.W. 2d 802 (1972); State v. Sandoval, 92 Idaho 853, 452 P.2d 350 (1969); People v. Phinney, 22 N.Y.2d 288, 292 N.Y.S.2d 632, 239 N.E.2d 515 (1968); State v. District Court of Thirteenth Judicial District, 150 Mont. 128, 432 P.2d 93 (1967); State v. Zucconi, 50 N.J. 361, 235 A.2d 193 (1967).

Further there was no interrogation. DeConingh's statements were not made in response to police interrogation, see, e.g., Reddish v. State, 167 So.2d 858

(Fla. 1964),[3] but were blurted out in the form of a narrative. See, e.g., Cummings, supra, Bartram, supra. Miranda, supra does not apply where there is no custody or a person has not been deprived of his freedom in a significant way, and there is no interrogation. When Miranda does not apply, the issue of whether there was a knowing and intelligent waiver of Miranda rights never arises, see Cummings, supra.

[5] We turn next to the question of voluntariness which on the facts of this case must be considered on general due process grounds as distinct from the issue of waiver. U.S. Const. Arts. V, XIV; Art. I, §9, Fla.Const.(1968). See,

[3]Reddish, supra, was decided before Miranda and the court never addressed the iossue of custody. Reddish, however had been served with an arrest warrant prior to hospital admission and his statements were the product of police interrogation.

e.g. Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed 2d 653 (1964); Brown v. Mississippi, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682 (1936); DeCastro v. State, 359 So.2d 551 (Fla. 3d DCA 1978). The record establishes that DeConingh gave the statements in the presence and against the advice of her attorney and in a narrative form absent any threats, promises or other physical or mental coercion caused by police procedure. Although the question of whether the statement itself was voluntary does not usually arise as an issue separate from that of whether the waiver of Miranda rights was voluntary, the test of "voluntariness" in either situation is the same, i.e., whether under the totality of the circumstances the confession was the product of mental or physical coercion, brutality or some other improper police procedure which caused the confession to be

involuntary. See, e.g. Palmes v. State, 397 So.2d 648 (Fla. 1981); Wilson v. State, 304 So.2d 119 (Fla. 1974); McDole v. State, 283 So.2d 553 (Fla. 1973); State v. Beck, 390 So.2d 748 (Fla. 3d DCA 1980); State v. Williams, 386 So.2d 27 (Fla. 2d DCA 1980); Barnason v. State, 371 So.2d 680 (Fla. 3d DCA 1979), cert. denied, 381 So.2d 764 (Fla. 1980); DeCastro v. State, supra; Lane v. State, 353 So.2d 194 (Fla. 3d DCA 1977); Melero v. State, 306 So.2d 603 (Fla. 3d DCA 1975); Paulk v. State, 211 So.2d 591 (Fla. 2d DCA 1968). This court was held that where there is no evidence of coercion or other improper police procedure, a finding of whether a confession was knowingly or voluntarily made as a result of a medical condition is not mandatory, Melero, supra.

[6-8] Generally a confession which is the product of a mind confused by intoxication, excitement or mental disturbance not induced by extraneous pressure, raises a question of admissibility as a matter of law. Absent evidence of threats or promises or other improper police procedures, testimony about state of mind is irrelevant at pretrial hearing. See, e.g., Palmes, supra; Reddish v. State, supra; State v. Caballero, 396 So.2d 1210 (Fla. 3d DCA 1981); Melero, supra. In Reddish, supra, the court made an express and singular exception to this general rule in finding that Reddish's statements were inadmissible because his confused mental state prevented his answers to police interrogation from being voluntary. We find Reddish of limited significance and inapplicable to DeConingh's situation. Not only had Reddish been served with an arrest

warrant prior to hospital admittance, he was interrogated by the police. Under Miranda, Reddish would have been considered as in custody, but he was without the benefit of the subsequently decided Miranda case. Moreover, none of the five factors[4] carefully established

[4]The court in Reddish, supra, established that:

1. The court had before it a precise record of the drugs administered to Reddish by name, date, and hour.
2. The record before the court related the time significance of the narcotic dosages to the obtaining of the confessions.
3. The initial confession was obtained from Reddish the same day he entered the hospital. Reddish was sufferring from an almost fatal pistol wound, had bled profusely and had received three transfusions of blood. He was in a condition of great physical shock.
4. There was testimony of a medical doctor as to the effect of the drugs administered to Reddish.
5. The suppressed statements were in the form of questions propounded by the state attorney and answered by Reddish.

There is no evidence in the record of the exact medication that DeConingh received while in the hospital by name, hour or dosage.

by the court in Reddish, supra, as justifying the exception are present in DeConingh's case.

We hold that because DeConingh's statements are not the product of a coercive custodial interrogation, and the record establishes that the statements were voluntary, the trial court erred in granting the motion to suppress those statements.

The most that DeConingh can point to is testimony of Sema McAninch, who has a degree in psychology, that she knew appellee had been prescribed 50 milligrams of thorazine and 10 milligrams of valium because she had discussed DeConingh's medical plan with DeConingh's doctor. McAninch did not kn ow how many times a day DeConingh received medication. The record is devoid of any hospital record or testimony by a medical doctor as to whether DeConingh had actually received any medication. There is no testimony by a medically trained expert as to the effects of the drugs allegedly administered to DeConingh and there is no evidence that DeConingh was in a weakened physical condition.

Reversed and remanded to the circuit court for proceedings consistent with this opinion.

HENDRY, Judge, dissenting.

I respectfully dissent from the majority opinion. The circumstances surrounding the making of the inculpatory statements by the appellee present an interesting variation on the case law relating to the standards to be applied in determining whether a confession may constitutionally be admitted in evidence against its maker. Let us consider first whether an application of the requirements of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), is warranted and if not, whether the trial court's exclusion of the confession may be sustained on the basis of safeguarding appellee's Fifth Amendment privilege against self-incrimination

which the Miranda procedure also serves to protect.

It is my view based upon my review of the record that the trial court's ruling is supported by competent, substantial evidence and was a proper exercise of the court's function of hearing the evidence, resolving evidentiary conflicts and ruling on the admissibility of a confession which is sought to be suppressed on the ground that its taking was in violation of the defendant's privilege against compelled self-incrimination.[1] I further find the trial court to have specifically delineated its factual findings that based on appellee's mental condition and the circumstances under which the confession was taken, the voluntariness constitutionally required to allow

[1] Peterson v. State, 372 So.2d 1017 (Fla. 2d DCA 1979); Lane v. State, 353 So.2d 194 (Fla. 3d DCA 1977); Melero v. State, 306 So.2d 603 (Fla. 3d DCA 1975).

admission of the self-condemning statements into evidence could not reasonably be said to have existed at the time the statements were made.

Moreover, my conclusion as to the correctness of the ruling on a constitutional basis appears to be at odds with the majority's view that the question of voluntariness presented here did not raise a constitutional violation which would prevent its admissibility, and thus the confession should have been allowed to go the jury.

I find inapplicable the line of cases typified by State v. Williams, 386 So.2d 27 (Fla. 2d DCA 1980), holding that a defendant's anxious or distressed mental state arising form his own apprehension of the situation in which he finds himself, as opposed to being the result of external, improper police influences, presents a question not of admissibility,

but of evidentiary weight to be given the confession, and so is properly to be considered by the jury. As is noted in the discussion of the facts, the trial court properly considered of the facts, the trial court properly considered other factors bearing on appellee's mental state which serve to distinguish this case from those cited by the majority, (for example, the severity of appellee's mental condition, the psychologist's testimony that the mental disorder arose just prior to the shooting, and the probability of influence on appellee's mind arising from her friendship with the deputy). I therefore would affirm the correctness of the suppression ruling.

The uncontroverted facts establish that appellee was hospitalized by her personal physician, due to hysteria, soon after the shooting death of her husband which occurred on September 30, 1978.

While in the hospital and on the dates in question herein, appellee was diagnosed by a psychologist as having a "dissociative reaction," a severe mental disturbance characterized by depersonalization and loss of touch with self and the external environment, and was regularly and continuously receiving medical administration of the drugs Thorazine and Valium.[2]

[2]The Physicians' Desk Reference, 35th ed., (1981), provides the following information as to the nature and effects of these drugs:

Thorazine is the brand name for chlorpromazine, a strong central nervous system depressant used in treatment of psychotic disorders. It also has sedative effects, may impair mental and/or physical abilities, especially during the first few days of therapy, and may cause adverse reactions such as drowsiness.

Valium is the brand name for diazepam, a central nervous system depressant used in treatment of anxiety disorders. Its side effects may include drowsiness, fatigue and infrequently, confusion or depression. It is also a controlled substance pursuant to section 893.03, Florida Statutes (1980).

On October 2, 1978, appellee was visited in her hospital room by Deputy Sheriff Rick Roth of the Monroe County Sheriff's Department and an other officer. Deputy Roth was a friend of appellee. He used her first name in addressing her, said something like 'things will work,' and then told her he wanted to know what had happened. He showed her an "advice of rights" form, which he gave her to read and asked her if she understood, which she said she did, and signed. The deputy did not read appellee's rights to her, nor did he attempt to determine if she had in fact understood what she had been given to read and had signed. Appellee began to make a statement, but was stopped when a friend who was also present in the room suggested she wait for her attorneys to be present. Her attorneys arrived and after speaking to her privately, suggested to

Roth that the taking of the statement be delayed until the following day as she was in no condition to testify, at which point both officers left.

On October 4, 1978, Roth and another officer returned to appellee's hospital room. Her two attorneys were also present. Again Roth did not advise appellee of her rights, but indicated to her the "advice of rights" form she had signed two days before and asked if she knew it was still in effect, to which she responded yes. Although her attorneys advised her against doing so, appellee insisted on making a statement. She said repeatedly that Rick Roth was a friend and she wanted and had to tell him what happened; she could not let him think bad of her. The statement, given in the form of a narrative at her attorney's suggestion, was recorded and later transcribed and is the chief subject of appellee's

motion to suppres which is the basis of this appeal.

Deputy Roth testified that appellee was visibly upset during the meetings, but could carry on an intelligent conversation and understood what was happening; however, this testimony is controverted by that of her two attorneys, the state's own witnesses, that she was not able to understand what was said to her, nor was she aware of the consequences of making a statement, nor was she in any condition to testify while in the hospital, being "hysterical" and "uncontrollable" and breaking down on many occasions while giving her statement to the deputy. The latter testimony, taken together with that of the psychologist who testified on behalf of appellee to the effect that she was suffering from a severe mental disturbance which probably arose just prior to the alleged shooting, and was

"definitely not rational" during the time frame in which the statements were made, is, I believe, sufficient to outweigh the testimony of the deputy and provide competent and substantial evidence to support the trial court's ruling.[3]

Let us next consider the relevant legal authorities, beginning with Miranda v. Arizona, supra, and then take up other decisions which I find applicable to the facts before us. The state has urged and the majority opinion has similarly held that the trial court's application of the Miranda doctrine was not warranted by the facts in that they do not comprise the

[3]I note that the standard to be applied in appellate review of a trial court's determination of fact questions in a suppression hearing is a deferential one; such determination will not be reversed unless clearly shown to be without basis in evidence or predicated upon an incorrect application of law. State v. Riocabo, 372 So.2d 126 (Fla. 3d DCA 1979), dismissed, 378 So.2d 348 (Fla. 1979).

type of in-custody interrogation contemplated by Miranda. I agree that this case does not fall squarely within the well defined pattern of circumstances which would require the exclusion of a confession based on noncompliance with Miranda.[4] For example, the essential element of "custody," or the officers' intent to hold appellee, is lacking in that she had been privately admitted to the hospital by her own physician and her freedom of movement was not restricted by the officers. I thus find that a review of this case based on the standards set forth in Miranda is not appropriate.

In support of its holding that Miranda is not applicable, the majority has cited numerous cases from other jurisdictions for the rule of law that

[4]For a discussion of the relevant Miranda factors, see page 1000 of the majority opinion.

police interrogation of a hospital patient concerning a criminal episode of which he may have knowledge does not amount to in-custodial interrogation so as to trigger Miranda. A review of these cases discloses that, while their main concern is the question of applicability of Miranda, they do not preclude a finding that under some circumstances, a confession given by a hospital patient to a police officer may be so lacking in voluntariness that it may not be used against its maker. See, e.g., People v. Phinney, 22 N.Y.2d 288, 292 N.Y.S.2d 632, 239 N.E.2d 515 (N.Y. 1968), stating the rule that if the circumstances under which the questioning occurred are likely to substantially affect the individual's will to resist and compel him to speak where he would otherwise not do so freely it could constitute an in-custodial interrogation so as to invoke Miranda, but

finding it inapplicable to the facts of that case.

While I would hold that the instant case is not directly controlled by Miranda, and thus the trial court's ruling, if it were based solely on that ostensible violation might require reversal, I find, however, that the trial court's suppression ruling may be sustained upon the basis that its extensive factual findings relative to appellee's mental condition, the influence of drugs and the surrounding circumstances under which the confessions were made, could be said to have reasonably led it to the conclusion that suppression of the confession was necessary to safeguard the appellee's constitutional rights.[5]

[5]My review is limited to considering the record evidence on this point in the light most favorable to the successful movant and resolving evidentiary conflicts in her favor. State v. Williams, 371 So.2d 1074 (Fla. 3d DCA 1979), cert. denied, 381 So.2d 771 (Fla. 1980).

My view in this regard is, I think, supported by the leading Florida case of Reddish v. State, 167 So.2d 858 (Fla. 1964), which was decided before Miranda, and which continues to be applicable in those situations, such as in the case at bar, where in-custodial interrogation sufficient to invoke Miranda is not present. The Florida Supreme Court in Reddish applied a test of the "totality of circumstances" to reach its determination that the defendant's incriminating responses to the questioning of a state attorney at the hospital were unconstitutionally obtained in violation of Article I, Section 12 [now Section 9] of the Florida Constitution. Factors explored by the court as bases for its decision were the defendant's serious physical condition caused by a self-inflicted gunshot wound in the chest and heavy loss of blood, combined with the impact of

several pain-killing narcotics, the lack of clearcut testimony regarding his mental condition, and the court's view that the taking of the confession under these circumstances constituted an element of psychological or physical coercion. The court stated the rule that:

> If for any reason a suspect is physically or mentally incapacited to exercise a free will or to fully appreciate the significance of his admissions, his self-condemning statements should not be employed against him.
>
> 167 So.2d at 863.

Applying these standards enunciated in Reddish to the facts of the present case, I find in the "totality of the circumstances" which the record presents, an individual who was seriously mentally incapacitated and under the influence of two sedative drugs at the time she made the challenged confessions. The record further supports the conclusion that the

appellee, in her impaired state of mind, was influenced by her friendship with Deputy Roth and apparently felt some compulsion to make a statement to him because of this.[6] Additionally, I note that defendant disregarded her attorneys' advice not to give any statement, and persisted in so doing. This clear, record evidence, together with the presence of testimony as to the appellee's mental state at the time the confessions were given, provides ample support for the trial court's suppression ruling and, I think, requires its affirmance. I also note, and give due deference to, the fact that a trial court's ruling against the

[6]Although this factor alone would not be determinative, see, e.g., Halliwell v. State, 323 So.2d 557 (Fla. 1975), holding that in a situation requiring Miranda warnings, the giving of those warnings by a friend of defendant does not vitiate their effectiveness, I believe it may properly be considered on review as part of the totality of circumstances.

state on a motion to suppress necessarily implies a finding that the state did not meet its burden is that of proving by a preponderance of the evidence that the confession was freely and voluntarily given, McDole v. State, 283 So.2d 553 (Fla. 1973).)

I find it appropriate to note at this point a strand of legal authority which lends additional support to the suppression ruling, to-wit: the confession of a person who is mentally or physically incapable at the time is considered inadmissible against him, as involuntarily given, 3 Wharton's Criminal Evidence §672 (13th ed. 1973); Blackburn v. Alabama, 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960); Harvey v. State, 207 So.2d 108 (Miss. 1968), and the degree of insanity which would render a confession incompetent is that which would be sufficient to render the defendant incompetent

to testify. People v. Lambersky, 410 Ill. 451, 102 N.E.2d 326 (1951). While the insanity issue was not directly raised before the trial court, the record facts could conceivably support such a theory, which further demonstrates the correctness of the court's ruling.

For the foregoing reasons, and based upon the authorities cited, I would affirm the order of the trial court.

IN THE CIRCUIT COURT OF THE
16th JUDICIAL CIRCUIT OF
THE STATE OF FLORIDA IN AND
FOR MONROE COUNTY

CRIMINAL DIVISION

CASE NO. 78-988-CF-A-31

STATE OF FLORIDA,)
Plaintiff,)
vs.)
SUZANNE deCONINGH,)
Defendant.)
_____)

ORDER GRANTING DEFENDANT'S
MOTION TO SUPPRESS

THIS CAUSE came on to be heard upon the defendant's Motion to Suppress Statements, and the Court having heard the testimony of the witnesses, the arguments of counsel, and being otherwise advised in the premises, it is, therefore

ORDERED AND ADJUDGED that the defendant's Motion to Suppress Statements be, and the same is hereby, granted.

In support of this Order, the Court makes the following findings:

1. The death of the victim occurred on September 30, 1978, and the defendant herein, the victim's wife, was hospitalized soon thereafter. A deputy sheriff of the Monroe County Sheriff's Department hereinafter referred to as deputy, not in uniform and who was personally acquainted with the defendant, went to see the defendant at the hospital on October 2nd, and upon approaching her, addressed the defendant by her first name. The deputy testified that he did not read her her rights from his Miranda card, nor did he verbally advise her of her Miranda rights; but, instead, he gave her a so-called "advise of rights" form; he testified that she read it, signed it, and said she understood it. Admittedly, the deputy made no attempt whatsoever to ascertain if the defendant did in fact

understand what she read, what she signed, or whether she understood the consequences of giving a statement. No statement was taken at this time. The said "advice of rights" form was not offered in evidence and this Court is unaware of its contents.

2. On October 4, 1978, the same deputy again went to the hospital to interrogate the defendant, and this time her attorneys were present. Defendant's attorneys admitted they did not advise her of her rights or the consequences of giving a statement, but merely told her that she did not have to give a statement and that she should not. Again, the deputy testified that he did not advise her of her rights; but, instead, he indicated to her the "advice of rights" form signed by her two days previously, and stated did she know it was still in effect, to which she replied yes. Again the deputy

did not advise the defendant of her rights, neither from the Miranda card, nor verbally, nor by reading her the "advice of rights" form; again no effort was made to ascertain whether or not she even remembered what was on the "advice of rights" form and whether or not she understood the consequences of giving the deputy a statement. A statement was taken from the defendant on this occasion.

3. The testimony of the witnesses indicates that on both October 2nd and October 4th, as well as at other times, the defendant's condition was described as upset, crying, confused, disoriented, at times catatonic, not rational, under medications of thorazine and valium, and hysterical.

4. On October 2, 1978 and on October 4, 1978, the defendant was not properly advised of her constitutional rights; the defendant did not understand

her constitutional rights; the defendant did not waive her constitutional rights; and, that the defendant was so emotionally upset or distressed, and of such an irrational state of mind that any statements given or made on either of those two occasions were not made voluntarily or knowledgably or with a full understanding of the consequences of making any such statement. Such statements, therefore, must be suppressed.

It should be noted here after the evidentiary portion of the hearing, after the arguments of counsel, and after the Court verbally rendered its decision together with its reasons therefor, the State then attempted to introduce the "advice of rights" form in evidence. The defendant objected. The Court sustained the objection on the grounds that the matter had been heard, argued, a decision

rendered, and the matter, in effect, concluded.

DONE AND ORDERED at Key West, Monroe County, Florida, this____day of June, 1980, as of May 8, 1980.

_____
CIRCUIT JUDGE

Copies to:

David H. Bludworth, Esq.,
Jack Denaro, Esq.
Mitchell Denker, Esq.

IN THE CIRCUIT COURT THE 16TH JUDICIAL CIRCUIT IN AND FOR MONROE COUNTY, FLORIDA

CASE NO. 79-788

STATE OF FLORIDA,	)	
Plaintiff,	)	
vs.	)	MOTION TO SUPPRESS
SUZANNE DeCONINGH,	)	
Defendant.	)	
	)	

TRANSCRIPT OF PROCEEDINGS

TESTIMONY AND PROCEEDINGS BEFORE the Honorable Helio Gomez, Circuit Judge, at the Monroe County Courthouse, Key West, Florida, on the 8th day of May 1980, commencing at 1:00 p.m. as reported by Christine B. Smith, Official Court Reporter, 16th Judicial Circuit of Florida.

RICHARD ROTH,

a witness called at the instance of the defendant, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DENARO:

Q: Would you state your name and your official capacity, please.

A: Richard Roth, Deputy Sheriff, Monroe County Sheriff's Department.

Q: How long have you been so employed, Officer?

A: 15 years.

Q: I direct you attention to the name of Suzanne DeConingh and ask you if you have ever met an individual by that name?

A: Yes, I have.

Q: Do you see her in the courtroom today.

A: Yes.

Q: Indicating for the record, the defendant. Did you have occasion to investigate the alleged homicide of George DeConingh that took place on approximately the 30th of September 1978?

A: Yes. I was investigating--

Q: (Interposing) When did you first become involved in the investigation.

A: On the first, I believe, on the following day. I was out of town when this incident happened.

Q: When was the first time you met Mrs. DeConingh, the defendant that stands before the Court?

A: This would have to be some years ago.

Q: With reference to the case, I'm sorry.

A: On the 2nd.

Q: On the 2nd, the 2nd of October 1978.

A: Yes.

Q: When you met her, with whom were you?

A: At that time it was at Fisherman's Hospital. She was hospitalized and I was with--at that time it was Sergeant Gregory, and also in the room was Joe Pierce. He came in the room. I believe that Dr. Rice was also in the room.

THE COURT: Whom did you say?

THE WITNESS: Dr. Rice.

A: Joe Pierce came in the room during a brief interview I had with Mrs. DeConingh.

Q: Do you know why Mrs. DeConingh was in the hospital at that particular time rather than at home?

A: Yes. She was admitted because she was upset. I believe she was admitted because of hysteria, sort of depression.

Q: Had you conferred with doctors to determine what state of affairs existed within her before you talked to her on the 2nd of October 1978?

A: No, I didn't.

Q: Do you know who her treating physicians were at the time?

A: I believe it was Dr. Mankowitz, yes.

Q: Approximately what time did you see her on the 2nd of October 1978?

A: It seems to me that was shortly after lunch on the first time.

Q: How long did you stay with her the first time?

A: Very briefly, about 15 minutes.

Q: Did you know or do you know what medication she was under at the time you saw her on the 2nd of October 1978?

A: No, I did not.

Q: Did you say she was not under the influence of medication at that time?

A: No, I couldn't say that.

Q: Why could you not say?

A: I don't know what she had been given. She was in the hospital. She apparently could have been given some medication.

She did not act--she was upset and crying, visibly upset. In our conversation she would pause and reach for words and cry.

However, she was not incoherent to a point where she didn't realize what she was saying.

Q: There was a certain incoherence, but it wasn't to the point where it was completely unintelligible. Would that be a correct statement?

A: That's correct.

Q: You indicated you were a friend of hers. How long had you been a friend of Mrs. DeConingh?

A: I don't know. Probably since, I

would guess, since the late sixties, probably.

Q: Were you a close friend of hers or just in passing?

A: Oh, we met frequesntly. We knew the same people. We had been to some parties, not together, but we had some mutual acquaintances.

Q: Would you say that your association with her was such she considered you to be a friend and she could trust you?

A: Yes.

Q: Now, what did you say to her when you went into the hospital on the 2nd of October '78 before she gave the statement?

A: I told her I wanted to take a statement of what happened. I wanted the information, the facts, about what had happened.

Q: Yes, go ahead.

A: I advised her of her rights and asked her to sign a waive of rights, which she did. She was going to give me a statement.

Q: Was her attorney present or was any attorney preent when you advised her of her rights?

A: No, not at that time.

Q: How did you advise her of her rights on the 2nd of October '78?

A: We have a standard form that we are supplied with. I used that form.

Q: Did you read it to her?

A: No. I handed it to her. She read it herself.

Q: Do you recall how long she looked at it before she signed it?

A: Well, she didn't take it and read it and hand it back. It wasn't a one minute type of thing. She was crying. So, she would look at it. She would put it down. She'd say things

about how she was upset. She'd say things like, Oh, I'm sorry, or my mother will never forgive me or stuff like this.

So, she didn't read it completely through and then sign it and hand it to me all at one time.

Q: From the time she first received the document, the interrogation advice of rights form that you've been talking about until she finally signed it, approximately how long a period of time did it take her to actually go through it after she would break and cry?

A: Probably about three or four minutes.

Q: At any time did she ever ask you to explain any of the rights or statements that were in the document?

A: No.

Q: At any time from the time you first handed her the interrogation form

until she signed it, did you explain to her what the rights meant?

A: When she concluded reading it and signing it, I said, "Did you understand it," and she said she did understand it.

Q: Did you ask her what she understood by it?

A: No, I didn't.

Q: What did she say right before she signed it?

A: Right before she signed it?

Q: If you recall.

A: I don't recall anything specific, no.

Q: Did she appear to be steady at this time when she signed it?

A: No, she was not steady, no.

Q: I'd like to show you a document--if the Court would mark this, please. There is one in the Court file, I think.

MR. BLUDWORTH: I have no objection. I have one that's not marked on. This is just a copy. The other one was entered in the last hearing.

MR. DENARO: As long as it's a true copy.

MR. BLUDWORTH: You take mine. I'll make a copy for the hearing.

BY MR. DENARO:

Q: I show you what's been marked--if I have the liberty of marking it--

THE COURT: Let me mark that one for identification, Defendant's A for the purposes of this hearing. (The document referred to above was marked as Defendant's Exhibit A for identification.)

BY MR. DENARO:

Q: Lieutenant Roth, I show you what has been marked for identification as Defendant's Exhibit A and ask you if you can identify that document.

A: Yes, That's a Xeroxed copy of the original she did sign.

Q: I direct your attention to the signature in the lower left-hand corner. Whose signature is that?

A: Lower right. Suzanne's signature.

Q: I'm sorry. Lower right. Is that her normal signature?

A: In all fairness, I don't think I've seen her normal signature, so I couldn't answer that question.

Q: After she signed the rights form, what took place?

A: She started to give me a statement of what happened. During the statement, during this discussion--we had a tape recorder--during this discussion Joe Pierce came in and Joe Pierce suggested she wait for an attorney.

Suzanne didn't think she needed one, but Joe felt she should have an attorney present.

So, I agreed if she wanted an attorney, there would be no problem. I would leave until an attorney was present.

I left and then Mr. Lenzi and Mr. Cunningham came to the hospital. I think what happened is Joe came in and said he had called an attorney and they'd be over there shortly, that I should wait until they got there.

I agreed. I stopped at that time and they did arrive.

Q: From the time you went to the room until she signed what has been marked for identification as Defendant's Exhibit A, did she ever become hysterical from the time you entered the room until she signed the rights form?

A: Uncontrollable, no. I wouldn't--hysterical to my mind, I envision being uncontrollable, throwing things, screaming, no.

Q: To the best of your recollection, then, how would you describe the way she acted and what her demeanor was from the time you went there until she signed the rights form?

A: She was crying, visibly upset. She would have to pause to think what she was going to say, to form her words, because she looked distraught.

She did not have any makeup on. She could carry on an intelligent conversation.

Q: Did you ever notice that her mind would be wandering and her conversation would be in a different area or a different subject as you were there before she signed the rights form?

A: I don't recall that, no, sir.

Q: Did you notice whether she had any difficulty understanding what you were saying?

A: What I was saying?

Q: Yes.

A: No, I don't think so. She did say she wanted to get this over with and she just wanted to get finished with it.

Q: Was she completely coherent?

A: Not completely, no, sir.

Q: Did she ever have to ask you to repeat a question?

A: Yes, I think she did.

Q: A number of times?

A: My impression was that she was--if I was saying something--we didn't have too much discussion that wasn't on the tape prior to this, so there wasn't a whole lot of conversation prior to the tape.

But as I recall, she would be crying and my impression was she didn't hear my question rather than didn't understand them because she was crying and sucking her breath.

Q: You've known her for a long period of time?

A: Yes.

Q: On the day that you saw her on the 2nd of October 1978, did she appear to you to be her normal person?

A: No.

Q: Did she appear to be completely different from what you had normally understood her to be or found her to be in private affairs?

A: Yes.

Q: Did you find that at this particular time that she was of a solid and complete state of mind, a normal state of mind?

A: Not normal, no. She's usually very cheerful, very friendly, a very cheerful person. She was not that way in this case.

Q: On the 2nd of October 1978 did you formulate an opinion as to whether or

not she was of a completely stable mind at the time you were talking to her?

A: She understood what I was saying and what was happening around her, yes, she did.

Q: Did you feel at that time she was completely stable and rational when you were talking to her?

A: She was upset and crying. If that's perfectly stable, no, she wasn't.

Q: Did you find anything that she had done on the 2nd of October 1978 until the time she signed the rights form to be irrational or out of character?

A: The fact that she was upset was out of character and the fact she was crying was out of character.

Q: Anything else besides that, the way she was talking, the way she was listening to you, the things that she said?

A: She was as any other person who is upset would have acted.

Q: Then the attorneys came?

A: Yes.

Q: Then what happened?

A: They went in. I was in the room. They came in. They said they'd like to speak to her alone. Myself and Gregory left.

Then they came out in the hall. They said they would like to put this off until tomorrow. They would like to talk to Suzanne and have a chance to talk to her and maybe she would calm down. I could take the statement the following day. I said fine and left.

Q: Did you come back the second time to interrogate her?

A: Yes, I did.

Q: What date was that, Officer?

A: That was a day later. That was on the 4th of October.

Q: Approximately what time?

A: That was 11:10, I believe is what my report says.

Q: Who was present at the time you saw her?

A: Myself, Sergeant Gregory, Robert Gregory, Joe Pierce, Chris Mankowitz and the attorneys Ralph Cummingham and Pete Lenzi.

Q: On this occasion was a statement taken from her?

A: Yes, it was.

Q: Now, before the statement commenced, that is, before she related to you what she knew about the episode for which she was arrested, did you communicate with her while you were there at the time?

A: My communication prior to that statement was based on I was here to take her statement and that did she realize that her waiver of rights was still in effect. She said yes and she--I told her

I was there to take a statement about what had happened.

Q: At any time on the 4th of October 1978 did you readvise her of what her Constitutional rights were?

A: No. I had the form. I held a form up. I said, "Suzanne, you signed this. This is still in effect." She said, "Yes."

Q: When you made reference to the form, you're making reference to Defense Exhibit A for identification, correct?

A: Yes.

Q: Now, what specifically did you say when you produced the form?

A: I said, "You know, this is still in effect."

Q: What did she say?

A: "Yes," she agreed.

Q: Did you read her that form or have her re-sign it?

A: No, I didn't.

Q: When you held the form in you hand, were you looking at the printed part of it or did you show her the printed part of it to her?

A: I just held it up. I was probably away too far for her to read. I held it up so she could see the printed parts. I don't feel like she read it that time, no.

Q: What was her condition on this particular day, the same as before?

A: Near the same. She was crying. She wasn't quite as bad as she had been two days prior, but nearly the same.

Q: But she still in your opinion appeared to be a person different from the person you normally have known?

A: Yes.

Q: Do you know what medication she was given on this particular day?

A: No, I didn't.

Q: Up until the time you talked to her on the 4th of October and took a statement from her, did you confer with her treating physician?

A: No, I didn't.

Q: At any time from the time you first saw her until you last saw her--, oh, let me strike that--At any time on the 2nd of October 1978 or on the 4th of October 1978, did you ever advise her that if she chose to remain silent, her silence would not be used against her?

A: I didn't say those words, no.

MR. DENARO: I have no further questions.

CROSS-EXAMINATION

BY MR. BLUDWORTH:

Q: I have just a few questions, Lieutenant Roth. You previously testified before Judge Chappell?

A: Yes, sir, I have.

Q: You were questioned by Manny James?

A: Yes, sir, that's correct.

Q: Did he ask you similar questions?

A: Yes, sir.

Q: Did you have the advise of rights? You turned that in, the original, at the time?

A: Yes.

Q: Did you play the tape recording?

A: No, I did not.

Q: Did you have it with you and deliver it to the Court?

A: The Court tape has been placed in--I don't think the Court has heard it.

Q: There is a tape of this. The question is did you have to repeat things that would be on the tape?

A: Yes, sir.

Q: Have you had this transcribed by someone and reduced to writing?

A: Yes, I have.

MR. BLUDWORTH: Judge, I had your secretary make copies. You probably don't have a copy.

MR. DENARO: Yes, I have.

MR. BLUDWORTH: You have? Okay. I'll take it back.

BY MR. BLUDWORTH:

Q: Have you read that?

A: Yes, I have.

Q: Does that accurately reflect what occurred?

A: Yes, it does.

Q: On the first date, how long after the events of George DeConingh having been shot to death do you go and see the defendant?

A: Two days.

Q: You weren't at the home? You didn't go to the scene, did you?

A: I had been to the scene. This is the following--this is on the 31st or the 1st, I believe.

Q: When did this killing occur?

A: Evening of the 30th.

Q: You didn't go there, did you?

A: No, sir, I was out of town.

Q: Let's go back to why you say you understood how she was in the hospital. Was she under arrest?

A: No, she wasn't.

Q: Was she there because the physician asked her to be in the hospital?

A: No, she wasn't.

Q: Was she there because the physician asked her to be in the hospital?

A: No, she wasn't.

Q: Your understanding was she was there because she had a friend put her into the hospital?

MR. DENARO: That calls for a hearsay. That's speculation.

BY MR. BLUDWORTH:

Q: You don't know why she was there, do you?

A: No.

Q: But she wasn't there as a prisoner of the police department, was she?

A: No, she wasn't.

Q: All right. Now, any tests that had been done in normal medical circumstances by Dr. Mankowitz, those weren't ordered by yourself, were they?

A: No, they weren't.

Q: In other words, you didn't order them since she went in on the early morning after the 30th, you didn't order her to take a blood test, did you?

A: No.

Q: You didn't order her to be given any kind of shot to calm her down, did you?

A: No, sir.

Q: To your knowledge, none of the police or law enforcement agencies did those things, did they?

A: No, they did not.

Q: It's your understanding she stayed there for a period of time for treatment?

A: Yes, sir.

Q. She was there under her own personal physician?

A: Yes, sir, that's correct.

Q: As I read--I haven't listened to the tape, either--but as I read this, you stopped after advising her of her rights and having her sign this, which you said you don't know her normal signature, this exhibit which is a copy we've marked here. You say you didn't read it to her; is that correct, Rick?

A: I handed that to her and asked her to read it.

Q: This is 1:15 in the afternoon?

A: That's the first time I was there, yes, sir, that's correct.

Q: When you talk about her appearance, was she in a private or semi-private room?

A: Private room.

Q: Other people were present?

A: Yes, they were. I take that back. It seems to me there were two beds. It was semi-private, but nobody was in the adjoining bed.

Q: Well lit?

A: Yes.

Q: Was it comfortable in there, air conditioning working?

A: Yes.

Q: She didn't appear to be uncomfortable, did she?

A: She was crying.

Q: How long have you been a police officer?

A: 15 years.

Q: Have you seen anybody that was normal after they shot their husband?

A: No, I haven't.

Q: When you talk about somebody crying two days after they shot their

husband, that wouldn't be abnormal, would it?

A: No.

Q: Might be abnormal if somebody wasn't?

A: Yes, I would say that's a true statement.

Q: Now, was she able to relate to you and talk to you and converse, ask you questions?

A: She didn't ask any questions, really. She just said, "I want to get this over with. I want to give a statement. I want to get it finished with."

Her attorney instructed me prior to taking the statement not to ask her any questions. We didn't have back and forth question and answer type conversation.

Her attorney says, "Let her give you a narrative and don't ask any questions."

I said, "Fine."

Q: When you stopped the first time and you left her to talk to her attorneys, Mr. Cunningham and Mr. Lenzi--I assume we'll have them in to testify--they were attorneys who represented her, right?

A: Yes.

Q: And you came back a day and a half or two days later?

A: Two days later, yes, sir.

Q: Was it nighttime? What time was it?

A: The second sttement was 11, 11:10 in the morning.

Q: Did she appear to be coherent?

A: Yes.

Q: Well lit room?

A: Yes.

Q: Were attorneys present? Were they physically there?

A: Yes, sir.

Q: That's Mr. Lenzi--

A: (Interposing) And Mr. Ralph Cunningham.

Q: Two lawyers present with this defendant?

A: Yes, sir.

Q: Is this the defendant right here that was in the hospital (indicating)?

A: Yes, sir.

MR. BLUDWORTH: Let the record indicate he has identified the defendant Suzanne DeConingh.

Q: Now, did she appear to be understanding what was going on at that time?

A: She could relate a narrative to me, yes.

Q: Then, I assume the tape would reflect that. Is this a transcript, a correct copy, of what appeared on the tape?

A: Yes, it is.

Q: Did you promise or threaten her in any way to get her to make a statement?

A: No, I didn't.

Q: Did you give any inducement to her or her attorneys for her to make a statement?

A: No.

Q: Did they ask you, the attorneys, if you would grant any favorable treatment of this case if they allowed her to make a statement?

A: No, sir.

Q: Did they know you to be a law enforcement officer?

A: Yes, they did.

Q: Did Mr. Cunningham and Mr. Lenzi--they've worked with you before?

A: Yes, sir.

Q: You were dressed in civilian clothes?

A: Yes.

Q: They know you as a police officer and that you were not someone other than a law enforcement officer?

A: Yes, I know both of them.

Q: The defendant knows you as a police officer? She wouldn't be laboring under any fact you weren't a police officer?

A: No.

Q: Did you show your badge?

A: No, I didn't feel it was necessary.

Q: Because she knew you were a law enforcement officer?

A: Yes, sir.

Q: You're not her priest. You were there in any official capacity, weren't you?

A: Yes, I was.

Q: She assumed--I hadn't listened to the tape, but we will if this goes--

she gave you a statement about what she says happened; is that correct?

A: Yes, that's correct.

Q: Have you had the time to read the sworn statement she made in the motion to dismiss by the defendant filed in this case?

A: I don't believe so.

Q: It was filed at a time subsequent to this statement under oath and I just wondered if you had an opportunity to look at it.

A: No, sir.

Q: Were you threatening, trying to get her to make a statement or were you just as calm as you are now?

A: Same as I am now.

MR. BLUDWORTH: I don't have any other questions.

MR. DENARO: I have just a few.

REDIRECT EXAMINATION

BY MR. DENARO:

Q: Do you know how the police obtained any blood evidence that was taken from her at the hospital?

MR. BLUDWORTH: Objection. There's no testimony the police took any blood from her.

THE COURT: Sustained.

Q: Do you know if a police officer took the blood samples from the hospital?

A: I don't know.

Q: You indicated that the transcripts that were made of the particular tapes were accurate, is that correct?

A: Yes, barring spelling and punctuation, yes, they are.

Q: I'd like to draw your attention, just to refresh your recollection, to Page 4 of the statement on the 4th day of October 1978, the fourth line down where

it says, "In just," and in parenthesis it says "inaudible." Are you sure it's inaudible?

A: You mean the word? She did not say "inaudible." That means the typist cannot recognize what she had said.

Q: If you play the tape, you would not be able to hear the words "in just as an expression"? You couldn't clearly hear from the tape those words "in just as an expression"?

A: What are you referring to?

Q: Right here on the fourth page. You indicated the transcript is accurate. The fourth line down on Page 4, if we played the tape, would it not be correct that you would clearly hear those words, "in just as an expression," rather than "in just an (inaudible)"?

A: You mean did she say "as an expression"?

Q: Can you hear it on the tape?

A: I don't know.

Q: Now, the transcript tht has been prepared, doesn't it give the time when she started to cry?

A: It doesn't give a time period, no, it doesn't.

Q: When she did give the statement to you on the 4th of October, she cried many, many times. There was lulls and lapses of time before she would continue on?

A: Yes, that's true.

Q: So, when you look at the transcript, one might get the impression she was very eloquent as she told her story, but that's not the case, is that?

A: Very eloquent? No, I would not use that term "very eloquent."

Q: Or unabridged or uninterrupted?

A: No, it was not uninterrupted, either, that's true.

Q: When you came to see her on the 4th of October--on the 2d of October 1978 when she signed the rights form, didn't she indicate to you she didn't think she would need an attorney?

A: Yes, she said that.

Q: When she said that, she was visibly upset?

A: That's true.

Q: She was crying and hysterical when she said that?

A: She was visibly upset. I don't think I would use the word hysterical.

MR. BLUDWORTH: He testified to this in direct. It seems it's culminative.

MR. DENARO: I have two or three questions on another line.

Q: The first time you went to see her for the first time was in your official capacity as a police officer?

A: Yes, sir.

Q: Was it not only as a good friend to see a good friend in the hospital?

A: I couldn't say that, no. I was a policeman.

Q: In other words, from the time you entered into the room on the 2nd of October 1978 until you left, you did not befriend her as a friend or treat her as a friend?

A: Yes, I did. I used her first name. I probably said something like things will work out.

Q: Did you say that before you started to advise her of her rights that things would probably work out?

A: Yes.

Q: When you made that statement, you were making it as a friend and not as a police officer?

A: Yes, probably more so as a friend than a police officer.

Q: Did you say anything else in that tone, in that vein?

A: I was only like that for a very short time.

MR. DENARO: I have no further questions.

MR. BLUDWORTH: Nothing further, Your Honor.

THE COURT: Thank you very much.

(The witness was excused.)

THEREUPON:

SEMA McANINCH,

called as a witness at the instance of the defendant, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DENARO:

Q: Would you state your name and your address, please.

A: Sema McAninch.

Q: Spell that, please.

A: (Spelling) M-c-A-n-i-n-c-h.

Q: Your address?

A: 93 Copa D'Ora (spelling) C-o-p-a D-'O-r-a, Marathon.

Q: What do you presently do?

A: Right now, a psychologist at the Guidance Clinic of the Middle Keys.

Q: What were you doing in most of September and October 1978?

A: I was also a psychologist there.

Q: Where is that located?

A: That's in Marathon.

Q: What were you doing before that?

A: Before that?

Q: What were you doing for them at that time?

A: I was working as staff psychologist there.

Q: What are your credentials in order to work as a staff psychologist?

A: I have a master's degree in counseling and I have two years after

that in special training in psychotherapy and Gestalt. Before that I worked at the Community Mental Health Center for five years in West Palm Beach, Florida, where I also was a consultant at the State Hospital in Hollywood.

I've been doing mostly evaluations and planning.

Q: I direct your attention to the name of Suzanne DeConingh and ask you did you ever come in contact with a person by the name on the 30th of September 1978 or immediately thereafter.

A: Yes.

Q: Do you see that person in court today?

A: Yes, I do.

Q: Would you point her out?

A: This woman (indicating).

MR. DENARO: Indicating the defendant for the record.

Q: How was it you met her on that particular time, on that occasion?

A: My immediate supervisor, Dr. David Rice, called me by phone that morning asking me to do an evaluation, an emergency evaluation, at the hospital with him.

Q: Did you do this?

A: Yes.

Q: When you arrived at the hospital did you meet the defendant?

A: Yes, I did.

Q: Would you identify for the Court as to what her condition was when you first met her, giving the exact or approximate time, if you can?

A: It was the morning and she was severely confused, disorientated. At times she was catatonic. She couldn't talk. She couldn't respond to the external environment. She seemed to be very

much in her own space and unreachable at times.

The evaluation itself took about three hours to get her to respond to questions and to bring her back. I would have to say, "Look at me. Tell me my name," things like that just to get her to respond.

Q: What was your initial diagnosis after you examined her?

A: She had a dissociative reaction.

Q: What is a dissociative reaction? Is that a mental state?

A: Absolutely.

Q: Would you explain to us what a dissociative reaction is in layman's, rather than clinical terms?

A: The person becomes depersonalized. They lose touch with themselves and with the external environment.

They, in a sense, just jump out of their bodies so they are watching

themselves rather than actually performing things. They are severely disturbed in that state of mind.

Q: Did you have occasion to examine her and treat her from the time you first saw her through and until the 4th of October 1970?

A: Yes, I did.

Q: When was she finally released from the hospital?

A: I'm sorry. I'd have to check because I don't remember the exact dates.

Q: Would you say approximately two weeks?

A: Yes.

Q: What was her condition on October 2, 1978 to the best of your recollection?

A: On October the 2nd she had a severe headache. she was still pretty disorientated. I would say that she was beginning to improve at that time.

She seemed to be in better contact with reality, less times of slipping off to another plane, let's say, you know, more--

THE COURT: (Interposing) Let me interrupt. I may have missed the date of the first time that you saw her.

THE WITNESS: I saw her on the 30th of September.

MR. BLUDWORTH: Is that the first time that you saw her?

THE WITNESS: No.

MR. BLUDWORTH: That's not the first time she had seen her.

THE COURT: I meant in relation to your being called by Dr. RIce and asked to come over.

THE WITNESS: Right, yes, sir, but I had seen her before. I knew her from before.

THE COURT: But the condition that you described--I just want to make sure--

THE WITNESS: (Interposing) That was September 30th, sir.

THE COURT: September 30th. I missed that date, then. Thank you. It's cleared up now.

BY MR. DENARO:

Q: Now, the condition you perceived with regard to the date of September 30, did it continue through the second and third day of October 1978?

A: Yes, especially the third day.

Q: The third day? Would you describe her condition on the 1st of October 1978, her mental condition?

A: She was still very confused and disorientated. She would still have periods where she would just not be able to respond and would have to be brought back.

She would sit up and just stare into space without being able to respond. She at one point experienced, she told me,

tactile hallucinations where she felt people touching her. There were nightmares at night. She would report the next day seeing figures.

Q: Did she report or do you recall her indicating that she had hallucinations on the 2nd of October '78?

A: I can't tell you exactly the 2nd, but I believe it was around that day, either the 2nd or the 3rd. It was just a couple days after she was admitted she was hallucinating.

Q: Were there times around the 2nd of October 1978 where she was uncommunicable, that is, you would talk to her and she could not respond or could not understand what you were--

A: (Interposing) That was true for the whole first week.

Q: That was true for the whole first week?

THE COURT: There's one thing that was bothering me her. The witness has stated or reported that Mrs. DeConingh told her she was seeing figures. I think that's what you were referring to when you said she was hallucinating?

THE WITNESS: Right.

BY MR. DENARO:

Q: Did you say that was, in fact, what she was doing, hallucinating?

A: Yes, sir. This is during nightmares when no one was in the room. She would see her late husband, George.

THE COURT: I just wanted to make sure about that. Okay.

BY MR. DENARO:

Q: When you say she was disorientated on the 2nd day of October 1978, what do you mean by that?

A: I mean that she was unaware of what day it was, how long she had been in

the hospital, things like that, what time of day it was.

Q: Did you formulate an opinion as to what her mental state was the first week of her entry into the hospital?

A: Yes.

Q: What was your opinion to her mental state during that particular period of time within reasonable psychological probability?

A: I would say she was very confused, extremely so, and very disturbed.

Q: Would you say during that period of time she was out of touch with reality?

A: Yes. That's a clinical term. It's very hard for me--that means one thing--when I'm answering yes to that question, there were times when I had to speak to her, call her name five or six times to get her to respond, things like that.

Q: Would you be able to render an opinion to this particular Court as to whether during the first week of her stay at the hospital that her state of mind was not rational?

A: Oh, definitely not.

Q: She was not rational?

A: No.

Q: Now, do you know what medication in terms of drugs that normally affect mental perception and mental ability that she was given from the time she entered the hospital through the 4th day of October 1978?

A: Yes, sir.

Q: Would you identify for the Court as to what medication she was given to the best of your recollection on the 2nd day of October 1978.

MR. BLUDWORTH: I would object unless she has her own direct information

be cause she's not a doctor. I doubt if she could give medication.

THE WITNESS: I have the hospital records.

MR. BLUDWORTH: Unless she gave any herself, I object to any testimony from her about what was administered.

MR. DENARO: I would ask the Court to mark these (indicating).

THE COURT: For identification, B, composite. (The documents referred to above were marked for identification as Defendant's Composite Exhibit B.)

BY MR. DENARO:

Q: I would like to show you what has been marked as Defendant's Exhibit Composite B for identification and ask you if you can identify them for the record.

MR. BLUDWORTH: Objection. I'd like to voir dire her as to how she can identify those records.

MR. DENARO: I think the next question is going to go into that.

THE COURT: Let's see what his next question is.

Q: How can you identify them?

A: I wrote in these. These are the hospital records that I wrote in every day at least one time, three times a day.

Q: In other words, the records before the Court are the records you made recording the defendant?

A: Right.

MR. BLUDWORTH: I know you're going to ask her about the medication. Now, I know her background. She can't give any medication.

THE WITNESS: That's correct.

MR. BLUDWORTH: You're asking her if those records reflect her giving any medication to this defendant.

It's your testimony that she's going to testify she ordered and gave medication to this defendant.

MR. DENARO: No, not that she ordered and gave, but the testimony will be--and these I'm attempting to get them in as an exception to the hearsay rule--these records for the most part were written by this particular witness and she has access to these particular records. If I can show through the witness that they were prepared in the normal course of events, I think it's an exception to the hearsay rule under the new Florida statute of evidence under the 800 series. These documents and, probably, more importantly and more cogently, these records were prepared, most of these records were prepared by this particular witness regarding the treatment of this particular defendant.

But regarding the drug and the drug administration, she could now testify if the recordation is in the hospital records, if she can identify the records, state they were made in the ordinary course of events, that she has access to them, it's no different. I think this would come in as an exception to the hearsay rule. The Court permits hearsay on a motion to suppress. Every time I argue, the State Attorney tells me that.

MR. BLUDWORTH: As I understand your question, it was what medication this witness she--I hope she didn't administer any medication. She's not qualified to do that, and I think you ought to have the predicate did she actually see her take any medication or no medication was prescribed for her from her own knowledge, otherwise the doctor or whoever prescribed it is going to be best able to testify to that.

I haven't voir dired her about her knowledge of--I do not know what a psychologist is.

THE COURT: This is argument between counsel.

MR. DENARO: Judge, no doctor could ever remember of his own personal independent recollection what he administered to a person or patient two years before, and he would have to rely upon the documents at hand.

In order to get them into evidence, they can only come into evidence, not because he was the one that administered it, but because these documents are hospital or business records and are an exception to the hearsay rule because if the law states that if they were made in the ordinary course of events for the business at hand close in time to the events they record, they are reliable.

No witness is going to remember what was administered on any given day two years before.

MR. BLUDWORTH: I have a general objection to the materiality and the relevance of it to this hearing, this motion to suppress. How are those records material to this?

You show the materiality and then the admissibility to be determined by the judge is whether she's a competent person to testify as to that. Hearsay doesn't have that much to do with that point.

My objection is on the materiality of those records.

THE COURT: Are those the original hospital records?

MR. DENARO: She couldn't take the original records out. Then she would have to testify to the Court that these are true and correct copies, or, if not,

then the Court will not allow them into evidence.

I would ask her questions so she could refresh her recollection through those records, but I think in terms of materiality, it would be more material than the hospital records of the patient.

THE COURT: I'm not going to admit those records because she may have written into some of those and she may recognize some of those, but the drift that I get is you're going to rely on the fact she wrote into some of those records to introduce them in evidence for the purpose of this hearing and also admit, thereby, other statements of the medication she is supposed to have taken.

I think that's improper that way. Those are only copies. She's not the official custodian of the records, and how she came into the possession of those, I mean, all these things are material.

I will let you know right now unless you can give me something more of what I see before me at the present time, I won't admit those copies into evidence for this purpose.

MR. DENARO: At this time I cannot give you more.

BY MR. DENARO:

Q: Do you have any independent recollection as to anyone administering of your own personal knowledge, anyone administering any medication to her in her stay the first day, first five days she was there?

A: Yes.

Q: You have personal knowledge of it?

A: Yes. I can't tell you exactly the day, but I can tell you the doctor, Dr. Rice, and I designed a treatment plan.

Q: You call him Dr. Rice?

A: Yes. He's a Ph.D. psychologist.

MR. BLUDWORTH: He's not a medical doctor?

THE WITNESS: Dr. Mankowitz is a medical doctor. With Dr. Mankowitz and Dr. Rice, I designed the medical plan. We discussed her medicine and her treatment on a daily basis.

Now, part of that time Dr. Rice was not in town, so I discussed her treatments, her progress and so forth with Dr. Mankowitz who was the attending physician each day, so I am aware of what medicine she had.

Q: What medicine are you aware of she received?

A: Thorazine (spelling) T-h-o-r-a-z-i-n-e, 50 milligrams, I can't remember how many times a day. I believe it was three times a day.

There was Valium, 10 milligrams. I believe it was three times a day. It might have been four.

Q: What is Thorazine?

A: Thorazine is a major tranquilizer usually used in the treatment for psychotic illness. It's an anti-psychotic.

Q: Is one of the symptoms of the use of Thorazine, is it depression and immobility, is that correct or not?

MR. BLUDWORTH: Objection. She's not competent to anwer any questions about medicine, about what medicine can do.

I object. She's not a competent witness to answer any questions about the medical effects of drugs unless it's shown she has medical training to testify about what drugs are used for. It's out of her field.

MR. DENARO: If no police officer can ever give an opinion about anyone under the influence of alcohol, or if a police officer cannot testify what the effect of heroin is, seeing a junky use a drug, if you see someone use a drug, you can testify to what the effects were.

It's not a question of admissibility, but weight for the Court to determine how worthy the evidence is on the particular point.

I think she can testify to the effects of drugs if she works with people that use them all the time.

MR. BLUDWORTH: If she saw her take it, what the lady did, I'm not objecting to that, to what the defendant acted like.

But to tell you what Thorazine does and what it's prescribed for, she's not competent to do that.

THE COURT: First, I'd like for you to inquire as to how she acquited this knowledge as to how these medications would react.

I can see where there may be some connection where she may be able to say through education and knowledge, it was acquired that way of how they would react, but she's not an expert, otherwise.

BY MR. DENARO:

Q: How have you become learned or how are you knowledgeable about the effects of Thorazine on the human body?

A: I have attended several workshops and seminars in psychopharmocology done by the Minger Foundation and by several different psychiatrists while I was working at the Mental Health Center in West Palm Beach.

Q: During this particular training, did you ever see people who had been administered Thorazine?

A: Many times.

Q: How many occasions?

A: Hundreds.

Q: What are the effects of Thorazine?

A: Thorazine is a motor tranquilizer. It's used to calm people down.

Q: What was the effect of Thorazine upon the defendant during this five or six day period, that is, the first week she was in the hospital?

A From the times I can remember being there, just after she took the medicine, I would say within half an hour she was sleeping. It made her very sleepy, groggy.

MR. DENARO: I have no further questions.

CROSS-EXAMINATION

BY MR. BLUDWORTH:

Q: Mrs. McAninch, what is your degree in?

A: Guidance and counseling.

Q: You're not a psychologist, are you?

A: I am a psychologist, yes, that's my field.

Q: You are a psychologist. Are you registered with any Board?

A: No. You have to be a Ph.D. to be registered.

Q: So, you're not what we call a psychologist, are you?

A: I have a master's in education.

Q: A master's in education?

A: That's correct. It's in guidance and counseling.

Q: You're not a psychologist?

A: I don't know what you'r asking me. That's what I work at. That's what I've been working at for ten years.

Q: Could you qualify under any state as a clinical psychologist?

A: No. You have to have a Ph.D. to do that.

Q: David Rice, you call him Doctor Rice. He's just a clinical psychologist, isn't he?

A: He's a Ph.D. psychologist.

Q: He is not a medical doctor, is he?

A: No.

Q: A psychiatrist is a medical doctor?

A: Yes, sir.

Q: Because he has special training in psychiatry?

A: Yes, sir.

Q: To your knowledge has Mrs. DeConingh been seen by a psychiatrist?

A: Has she? I don't know when you're asking.

Q: Prior to your seeing her the first of January 1978.

A: The first--

Q: (Interposing) When you first saw her she was deciding what she was going to do. She was being pursued by two men who wanted to marry her and she was diagnosed as having a transiency of disturbance.

MR. DENARO: That's completely irrelevant. If it did take placae, it took place well outside the time limits that we're talking about here. I only interrogated the witness on what had taken place between her and the defendant after September 30, 1978.

Apparently, the prosecutor is making reference to something that we didn't go into that happened well in the past, so its improper, immaterial, and irrelevant.

MR. BLUDWORTH: I won't go into it. I'll go into another area.

Q: Who asked you to go see her on September 30th?

A: Dr. Rice. Dr. Rice asked me.

Q: Who asked Dr. Rice to see her?

A: Dr. Mankowitz.

Q: He's the personal physician of the defendant?

A: Yes, sir.

Q: Do you know whether or not Dr. Mankowitz had ordered her into the hospital, admitted her into the hospital?

A: I believe he did.

Q: In other words, her personal doctor put her in the hospital?

A: Yes, sir.

Q: She got treatment in the emergency room. They took blood from her. Would that have been taken on Dr. Mankowitz' orders?

A: I don't know.

Q: To your medical knowledge, would any doctor, without knowing what a person had been taking, possibly drugs of any kind or how much alcohol, would they proceed to administer any kind of shots to your medical knowldge, before knowing what kind of blood condition the person had?

A: Unfortunately, I've seen it done.

Q: But you say unfortunately?

A: Yes. It's very bad procedure.

Q: We would assume that Dr. Mankowitz, a practicing physician of ordinary reasonable prudence, before he'd have the blood word which was done in this case--

MR. DENARO: (Interposing) Objection.

Speculation as to what the doctor would have done if he were a good doctor.

MR. BLUDWORTH: I'll ask her directly.

Q: Do you know if Ken Tatum, an E.M.T., took blood from Mrs. DeConingh?

A: I heard. I do not know for sure. I wasn't there.

Q: Did you bother to ask what her blood alcohol reading was before seeing these drugs or prescribing these drugs?

A: I didn't prescribe them.

MR. DENARO: Calls for hearsay and it's completely irrelevant as to what the blood reading was, and also incompetent as to show whether the blood analysis was correct.

MR. BLUDWORTH: I'm asking her--she said she was administering Thorazine and what it did for her specifically. I'd like to inquire if she--she testified that she and Dr. Rice, they sat with Dr. Mankowitz. They prescribed the medical

plan. discussed the Thorazine, 50 milligrams, three times a day.

THE COURT That testimony that three of them discussed what the treatment plan was has come in and, therefore, on that basis I'll have to overrule the objection.

BY MR. BLUDWORTH:

Q: In other words, did anybody tell you she read over .2 on blood alcohol for alcohol in her body at the time?

A: You're asking me about what, one night in the emergency room?

Q: Did anybody tell you that?

A: No, sir.

Q: Wouldn't you be curious? Did Dr. Mankowitz inquire of what her blood alcohol reading was?

A: I assume he did.

Q: You assume?

A: Well, I don't know. You're asking me did I know. I'm saying, no, sir, I don't know.

Q: You don't know, then?

A: No, I don't.

Q: In fact, if I read your report, you did make a report, didn't you?

A: Yes, I did.

Q: She was able to relate shooting her husband, wasn't she?

A: Yes.

Q: Have you had the occasion to talk to many people that shot their husband five times with a pistol?

A: No, sir.

Q: First one you have ever talked to?

A: Yes, sir.

Q: So, you're going to testify she was abnormal as relating to people who just shot their husband five times and

this is the first one you've ever seen this defendant right there; is that right?

A: As far as that goes, yes, sir, that's the first person I've ever seen that has shot their husband five times.

I've been with other people who had very serious trauma shortly afterwards, sir.

Q: You made a lot of statements in this report here. You went specifically into some of the facts, didn't you?

A: Yes, sir.

Q: She told you how she shot him, didn't she?

A: At that time she told me some things now that--well, they weren't the same things that I was told later.

Q: She told--

A: (Interposing) She told me she shot her husband, if you're asking me that.

Q: Let me ask you this: On September 30th did the defendant here appear remorseful?

MR. DENARO: Objection. It's irrelevant. It calls for speculation, "appeared remorseful." You can appear drunk, irrational. I don't think you can appear remorseful.

Q: You put that in your report that she was remorseful, didn't you?

A I wouldn't say on September 30th that was true.

Q: This is in your report. "Mrs DeConingh was extremely remorseful."

I'm reading from your report. You signed it.

A: Yes.

Q: Was she extremely remorseful?

A: Yes she was many, many times. I don't recall if on September 30th she was, however.

Q: Now, if a person was remorseful, in your experience would that indicate they knew they did something wrong?

A: That would indicate to me they felt that they felt they had done something wrong.

Q: In other words, killing your husband, they knew they did something wrong, right?

A: She felt that she had done something wrong.

Q: That would indicate she was able to, you know, that exhibits some kind of logic that people can distinguish right from wrong. That's an exhibit of logic, wouldn't you say, on behalf of a person?

A: Yes.

Q: She was able to think logically, wasn't she?

A: You're asking about September 30th?

Q: September 30th.

A: I could not say that.

Q: All right. Did she ask you or did you ask her if she had a lawyer or not at that time?

A: No, that wasn't discussed.

Q: Now, the fact that a person would kill somebody and knowing we have a law that punishes them for that, would that have any effect on the way she would act? We have defenses, people have, of insanity, right?

A: Right.

Q: You testified, I guess, in and around those kind of defenses; isn't that correct?

A: Right.

Q: Have you ever heard of the Ganger Syndrome in your studies?

A: I have.

Q: Have you ever heard of Dr. Wehoven (phonetically)?

A: No.

Q: So, you're not familiar with him, but you are familiar with Dr. Minger, aren't you?

A: Yes.

Q: You went out to Topeka?

A: No. They had a team that came to West Palm.

Q: Did Dr. Minger come to West Palm Beach?

A: No.

Q: He's been there, but his clinic is in Topeka, Kansas, is that right?

A: That's right, sir.

Q: So, you're familiar with the Ganger Syndrome? Have you ever interviewed anybody in prison?

A: Yes, many times.

Q: Many times?

A: Yes, sir.

Q: Have you ever had a person to react to being in prison, knowing what

their charges were and adapting their behavior appropriately to their circumstances?

A: You better believe it.

Q: Have you ever seen them being in remission?

A: Yes.

Q: They ar ebest in remission when they're locked up, aren't they, sometimes?

A: I can't answer that. It's not within my knowledge.

Q: You weren't present when she gave her statement to Lieutenant Roth, were you?

A: No, sir.

Q: Did you know her lawyers at that time, Mr. Lenzi or Mr. Cunningham, both very fine lawyers, Mr. Cunningham being a former state attorney from this county? Did you know them?

A: Yes, sir, I have for a long time.

Q: Did you talk to them before she made a statement to Lieutenant Roth about this case?

A: I believe I did.

Q: You did talk to them? Did you tell them that in your opinion that this lady was emotionally disturbed and she wasn't able to think logically? Is that what you told those lawyers?

A: I think so.

Q: You knew they were present and they authorized and said their client could give a statement.

MR. DENARO: Objection. He's making reference to facts that are not in evidence. He's asking her did you know these things happened when there's nothing in the record these things happened.

You may ask her what happened, but I don't think he can ask her about facts that are not in this record.

MR. BLUDWORTH: I think we do have it in the record. You asked Mr. Roth if he tried to take a statement and he stopped when she said to stop and later came back with the attorneys present. He did take a statement at that time. I thought that was testified to.

MR. DENARO: I'm objecting to the form of the question, did you know these facts actually existed. It's assuming it's proven, those facts.

THE COURT: I'm going to overrule the objection because the answer to that question is either yes, I know that or, no, I do not know that.

BY MR. BLUDWORTH:

Q: Do you know that she gave a statement?

A: Yes, I do.

Q: You knew that?

A: Yes, sir.

Q: You had talked interveningly between the times that you saw her on the 30th and when you made your report, you had talked with the attorneys, hadn't you?

A: Yes.

Q: So, attorneys are trained. They go to law school. We've heard about Giddeon versus Wainwright, but I assume you weren't present when they talked to the defendant, were you?

A: No, sir.

Q: It wouldn't be fair to ask you if you assumed they advised her of her rights or what happens when a statement can be used against you in a court of law?

A: No, it wouldn't, no.

Q: Did you ever read the statement she made?

A: No, I didn't.

Q: In fact, didn't you see her on the day of October the 4th, 1978?

A: Yes, I did.

Q: You saw her that day?

A: Yes.

Q: You saw her before she gave the statement to the police officer?

A: I'm sorry. I don't know.

Q: Did you know they were coming to take a statement for her? Did she discuss that with you, that she was going to see the police officer and talk about what happened?

A: I'm sorry. I don't recall. I imagine that she did. We talked about the other one.

Q: She didn't discuss it with you, I'm going to make a statement about this to the police officer"?

A: I don't think so. I don't know whether she did or not, but, Mr.

Bludworth, what I did with her had nothing to do with lawyers or police. What I was trying to do was treatment of a sick person. That's what I did. That's all I did.

We didn't discuss her lawyers or the law or anything like that.

Q: Would you say the inception of the so-called illness was then she shot five shots into her husband? Is that when it started, this illness?

A: I think it's an illness that probably started just before that.

Q: Before she shot her husband?

A: Probably just before.

Q: Just before?

A: Yes, sir.

Q: From the time you began administering to you until she was released from the hospital, did you find any indication she was malingering and her condition was not genuine?

A: Absolutely not. I didn't find any evidence of that.

Q: You indicate in your report there was a statement she felt remorseful, correct?

A: Yes, sir.

Q: Is it not a fact that feelings or remorse and guilt could provoke an aborrant mental state?

A: Yes.

Q: In this particular case can you give an opinion?

A: I cannot. I would say that the suicidal behavior was definitely related to feelings of remorse and guilt. We had to watch her every minute. We could not leave her alone.

Q: Was there an indicator of suicidal behavior on the 2nd day of October 1978 as far as you can remember?

A: As far as I remember she had talked about killing herself from the onset, from the time I saw her daily and repeatedly.

MR. BLUDWORTH: I have no further questions.

MR. DENARO: I have nothing further, Your Honor.

THE COURT Thank you very much.

(The witness was excused.)

THEREUPON:

PETER J. LENZI, JR.,

a witness called at the instance of the State, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BLUDWORTH:

Q: Would you state your full name, please.

A: Peter J. Lenzi, Jr.

Q: What is your occupation?

A: I'm an attorney.

Q: Where do you practice?

A: Marathon.

Q: What is the name of your practice?

A: It's a professional association, Cunningham, Albritton and Lenzi.

Q: Do you know Suzanne deConingh, the defendant in this case?

A: Yes, I do.

Q: Did you formerly represent Suzanne DeConingh?

A: Yes, sir, at one time in these processes.

Q: Let me ask you--

MR. BLUDWORTH: Judge, he's here by my subpoena. I'm going to ask him about representation. I would, in fairness, as I told Mr. Lenzi, I'm asking about having represented Ms. DeConingh. I do not intend to ask questions which would interfere with the lawyer-client privilege.

I want to ask if he represented her at the time the statement was taken. Is there anything you want to clarify on the record first, Mr. Lenzi?

A: Just so there's no--as long as--if the Court could give me a ruling as to the attorney-client privilege, that, of course, I'm not allowed to say.

THE COURT: Let's see if there's any objection. Go ahead with your questioning and we'll see what happens, Mr. Bludworth.

Q: Did you have occasion to be retained to represent Mrs. DeConingh after September 30. 1978 involving the death of her husband?

A: Yes, sir.

Q: Did you accept that representation?

A: Yes, sir.

Q: During that time specifically were you summoned and did you go to the

hospital where she was, Fishermen's Hospital, in Marathon, Florida?

A: Yes, sir.

Q: Did you counsel with her? Did you talk with her?

A: Yes, sir.

Q: Not what you said, but did there come a time when you met a Lieutenant Roth?

A: Yes, sir.

Q: You know him to be a police officer?

A: Yes, sir.

Q: Have you known him and worked with him in the past as a police officer?

A: Yes, sir.

Q: Did he make a request of you regarding taking the statement of the defendant in this case?

A: Yes, sir.

Q: Did you know that her husband George DeConingh was deceased?

A: Did I know?

Q: Yes.

A: Yes, sir.

Q: Did Lieutenant Roth promise or threaten you or try to get any inducement from you to get her to make any statement?

A: I could tell you what Lieutenant Roth said. I don't know what was going through his mind. Lieutenant Roth said that he wanted to do what was right by Suzanne. And the only way he could do it was to get to the bottom of the facts. He felt that the statement from her would prove beneficial.

Q: To get to the facts?

A: Yes, sir.

Q: All right. Did you counsel with the defendant, Mrs. DeConingh, before Lieutenant Roth talked to her? Did you have occasion to talk to her is what I'm saying, discuss the case, et cetera?

A: Before I spoke to Rick Roth the first time?

Q: After that, after you spoke to her.

A: We spoke to Suzanne, yes.

Q: You say "we." Is that you and Mr. Cunningham, Ralph Cunningham, your partner and an attorney?

A: Yes.

Q: Were you present when she gave the statement that was tape recorded to Mr. Roth?

A: Which statement are you referring to?

Q: The tape recorded statement of October the--

A: (Interposing) 4th or the 2nd?

Q: The 4th.

A: Yes, we were there on the 4th.

Q: So you heard it?

A: Yes, sir.

Q: Have you listened to the tape or read a transcription of what occurred?

A: I read the transcript.

Q: Does that reflect accurately what you heard with your naked ear that day as best you remember?

A: It's a difficult--if I'm allowed to, it's a difficult question for me to answer in this respect: A question would be asked or Suzanne would start to say something. There would be a break in what was being said first. The person transcribing it would say "pause" or the person would say "pause, crying," and then it would start again.

When you ask me whether that was accurate, if you sat there and listened, it wasn't accurate because she stopped talking and would break down for three or four or five minutes at a time. So, when you look at it on the printed page, it looks like a pause, like somebody took a

deep breath or something. That wasn't the way it happened. There were several lengthy breakdowns between the time the narrative was given.

Q: As to the facts, as to the contents--

A: (Interposing) I reviewed this in the preparation of this. I don't recall whether there was anything--

Q: (Interposing) Appears to be accurate?

A: Yes, sir.

Q: As an attorney have you represented criminal defendants before?

A: Yes, sir.

Q: Approximately how many defendants have you represented?

A: A hundred, a hundred or so.

Q: Do you specialize in criminal law?

A: I do quite a bit.

Q: Are you certified by the Florida Bar.

A: Yes.

Q: You list that as your specialty?

A: Yes.

Q: So, you were fully aware of the consequences of the statement of your client. Would that be a fair statement?

A: Yes.

Q: Was she aware of that, also?

A: I don't believe she was. I don't believe she was able to understand what was being told to her at the time.

Q: By yourself or--

A: (Interposing) By myself, by Mr. Cunningham, by the friends that were around her.

Q: Did she want to make a statement?

A: Yes, sir.

MR. BLUDWORTH: That's all I have.

CROSS-EXAMINATION

BY MR. DENARO:

Q: When you first talked to Lieutenant Roth, Mr. Lenzi, he indicated that he thought a statement would be to her benefit if she gave a statement?

A: Yes, sir.

Q: Did he make that statement to her in her presence, that if she gave a statement it would do her good or it would be beneficial?

A: No.

Q: Who did he make the statement to?

A: I believe Mr. Cunningham. In each instance Mr. Cunningham and I were together, so I think he would have said it to both Ralph and I.

Q: Do you know whether his statement to her was communicated to her by Roth or anyone else that it would be beneficial if she made a statement?

A: I can't answer that question. I don't know.

Q: Now, the first time that the police attempted to take a statement from the defendant was on the second day of October 1978, correct?

A: (Witness moves head up and down.)

Q: Did you go to her room in the hospital on that particular day?

A: Yes.

Q: Who was present when you arrived in the room, Mr. Lenzi, to the best of your recollection?

A: To the best of my recollection Joe Pierce was there, Rick Roth, Sergeant Gregory. I think he was a sergeant at the time in the sheriff's department. Suzanne was there. I believe Chris Mankowitz--I know Chris was there one of the two days, and the same with Dr. Rice and/or Sema coming in and our of the room

Q: On this particular occasion, could you describe for the Court what the condition of the defendant was on that day?

A: Hysterical.

Q: What was her mental state at that particular time?

A: On that date I can't tell you what her mental state was.

Q: Did she appear to be rational or irrational?

A: Whatever discussion took place between Cunningham, myself and Suzanne and the people around her away from the police officer, irrespective or what was said, all Suzanne said was, "I want to tell him. I have to tell him."

She says about Rick Roth, that she had known Rick Roth for years and she couldn't let Rick Roth think bad of her.

Q: How long did you talk with her before the proceedings began on the 2nd of October.

A: I don't think it was very long on the 2nd of October because she was so upset that Chris Mankowitz went and got her a shot to sedate her.

Q: What happened after that?

A: She was out.

Q: On that particular occasion, the day she was warned of her rights, she had to be sedated before you left?

A: (Witness moves head up and down).

Q: You have to answer out loud.

A: Yes. I'm sorry.

Q: Did you attempt to counsel her on her Constitutional rights?

A: That day?

Q: Yes.

A: What we said to Suzanne was that you do not have to say anything. We don't

think you should say anything, to which she would respond, again screaming and very upset, that she had to tell Rick what happened. She couldn't have Rick Roth think bad of her. That's what sticks in my recollection.

Q: At that time were you of the opinion she understood what she was telling you and she understood the consequences of what she would do?

A: We asked to determine what sort of medication she was on. I don't think she understood anything of what was going on around her.

Q: I direct your attention now to the 4th of October 1978 and asked you at approximately what time did you arrive when she was in the hospital.

A: To the best of my recollection it was late morning.

Q: Who was present at the time?

THE COURT: Would you clarify that? You said you don't think it was late. Were you talking about late in the morning or late in the day?

THE WITNESS: I said late morning, Judge.

THE COURT: I'm sorry. Go ahead.

A: I think it was the same people that were there. One or two might have been missing.

Q: What was her state, then, on the 4th of October 1978?

A: No different.

Q: Would it be your opinion that at that particular time she was irrational and not in complete control of her mental faculties?

A: Her condition was the same as we left a couple days before.

Q: Would that be she was out of control of her mental faculties?

A: There would be a hello and an acknowlegment that we were coming into the room. As soon as she got into any sort of discussion concerning the events, again, a breakdown.

Q: On this particular occasion, that is, the 4th of October 1978 were you of the opinion she was aware of the consequences of what she was doing?

A: You couldn't tell me by her actions she was noncommunicative. She wouldn't answer my questions. It was more a consoling, patting her hand, trying to keep her calm and people worrying about, and crying and said she was sorry and she was going to be punished.

Q: You have indicated for the record that you've been involved in a number of criminal cases.

A: Yes, sir.

Q: Have you ever had cases where the individual that you were required to

represent either by being retained or appointed by the Court or incompetent to stand trial?

A: No, sir.

MR. DENARO: I have no further questions.

REDIRECT EXAMINATION

BY MR. BLUDWORTH:

Q: In response to that, you said you advised her not to make a statement, Peter?

A: Yes, sir.

Q: But that she overrode your advice and wanted to make one?

A: Yes, sir.

MR. BLUDWORTH: That's all.

RECROSS-EXAMINATION

BY MR. DENARO:

Q: When you advised her not to make the statement, did she indicate to you she understood what the consequences of

making the statement were, that it could be used against her?

A: She never acknowledged that anything we said with anything we could determine that she realized what she was saying.

Q: Would it be your opinion that at the time you advised her she should not make the statement that she did not have the mental capacities or faculties to understand the consequences of her acts?

A: That's the reason of rather going through Miranda--when the question was asked did we advise her of the consequences, we didn't go through Miranda. We said you do not have to anser these questions and we advised against it. We felt that with all she could understand at that time, that that would sink in. I don't think she understood anything we were saying.

Q: You think at this particular time she understood you were her attorney and that you were there to protect her against the arm of the law? You think she had that ability to understand what was taking place?

A: (No response.)

Q: Is there a doubt in your mind?

A: It's a very difficult question. She knows Mr. Cunningham very well for a long time. When Ralph would come into the room, there was some look in her eye, some acknowledgment that Ralph was there and a hello.

But whether she understood the consequence of he being there as an attorney, that I couldn't possibly know.

MR. DENARO: No further questions.

FURTHER REDIRECT EXAMINATION

BY MR. BLUDWORTH:

Q: Why, if you thought her condition

was such as this, Peter, why didn't you advise Lieutenant Roth, even though my client says she is, I'm not going to represent her if she makes a statement? Did you consider that or why didn't you say because we have the testimony here, Lieutenant Roth. That's the first time she has been in this situation and for him to stop, stop like a good police officer and waited until there was a chance to-

A: (Interposing) Wait. I don't understand your question. Why we let her continue?

Q: Uh-huh.

A: Because she ws so insistent. She was just persistent. "I want to tell what happened."

Q: Do you find that to be consistent with, perhaps, what happened?

MR. DENARO: Objection. It's irrelevant as to whether its consistent or not.

THE COURT: Sustained.

MR. BLUDWORTH: I withdrew it. That's all. Thank you, Peter.

(The witness was excused.)

THEREUPON:

RALPH E. CUNNINGHAM, JR.,

a witness called at the instance of the State, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BLUDWORTH:

Q: Would you state your full name, please.

A: Ralph E. Cunningham, Jr.

Q: Your occupation, Mr. Cunningham?

A: Attorney-at-law.

Q: Mr. Cunningham, you were formerly a state attorney?

A: I was formerly state attorney.

Q: Do you list criminal law as part of your certification?

A: No.

Q: For the record, we did this with Mr. Lenzi. Do you know the defendant Suzanne DeConingh in this case?

A: I do.

Q: Did you formerly represent her in this cause?

A: I did.

Q: With Peter Lenzi and your firm?

A: That's correct.

MR. BLUDWORTH: You recognize the State has required the presence of Mr. Cunningham and recognize the lawyer-client privilege that once existed. We put this on the record with Mr. Lenzi.

Is there anything you want to clarify, because I'm not going into what advice was given, particularly, but what happened on the day the statement was taken? On your motion to suppress, do you want to have the Judge do anything to clear you so that we won't have any ethical problems about testimony?

THE WITNESS: There's been a stipulation as far as I know between the State and defense counsel as far as testifying by myself or Mr. Lenzi.

MR. BLUDWORTH: We haven't stipulated We'd like to ask Mrs. DeConingh to release you for these purposes from the lawyer-client privilege.

MR. DENARO: If he asks any questions concerning the confidential communications- but based on the first witness he called, I don't think we're going to have any confidential communication problem.

MR. BLUDWORTH: I just want to put it on the record. Mr. Cunningham is aware of the requirement and I respect that.

THE COURT: We didn't have any problem with Mr. Lenzi. I think this will proceed along the same line.

MR. BLUDWORTH: I want to make the record clear that they made me aware of it and I'm trying to stay within the proper boundaries.

BY MR. BLUDWORTH:

Q: Did you after September 30th have occasion to be called upon to represent the defendant here?

A: Yes, I did.

Q: Did you know her husband had been killed?

A: Yes.

Q: Did you have occsion to talk to Lieutenant Roth of the Monroe County Sheriff's Department?

A: Yes.

Q: Did he tell you that he attempted to take a statement on October 2nd?

A: Can I explain what happened?

Q: Yes.

A: We were in the office. We had a call from Joe Pierce advising us that

Lieutenant Roth and, I think, Gregory were in the hospital room with tape recorder taking a statement.

We immediately went over and went in the hospital room and requested that they stop proceeding any further. She was in no condition to testify.

With that, they left and wanted to set up taking a statement at some later date, which we agreed to. They were back either the next day or two days later. When we got in the room, they were set up again. We asked them to leave and we talked to Mrs. DeConingh at the time requesting she not make any statements.

She was determined to make a statement. We requested, again, that she do it in the narrative form and not be subject to any questioning.

Q: Then did he agree to do it in narrative form, and that's what was taken, right?

A: Correct.

Q: Have you had a chance to read that?

A: Briefly when I came in and I looked at it two days ago.

Q: Do you find it to be accurate as far as contents from what you read or what was said?

A: Didn't read it in that great a detail. From my sitting there, I was surprised that whoever typed this thing that they got that much out of it.

There were so many breaks. She was breaking down. I never heard the tape, either. I've read through it, most of it, yes. I question some of it.

There were big, large pauses where she was uncontrollable. I recall one point where Roth asked if they wanted to postpone it to some later date and she refused.

Q: Would you say it's fair to say, Ralph, that she wanted to make a statement over your advice as counsel and you were present and she did make a narrative statement?

A: Yes, that's correct.

Q: Did you explain to her, not what you said, but was she aware of the consequences of giving the statement, that it could be used against her?

A: In her condition, I don't know. She was just bound and determined she was going to make a statement and she was very insistent on that.

And I don't think that, as I recall, that it was quite traumatic, one, because she hadn't realized either after the first statement or just the day before or the morning before her husband was dead, so that she was in a total state of hysteria.

Q: Did you see Lieutenant Roth in any other capacity other than a law enforcement officer? What I'm trying to say, he wasn't there as a friend, but he was thee in his official capacity? Is that the way you saw him, as a law enforcement officer?

A: Right.

MR. BLUDWORTH: That's all I have.

CROSS-EXAMINATION

BY MR. DENARO:

Q: Did Lieutenant Roth indicate to you why he wanted to take a statement as to whether it would be beneficial to the defendant or not?

A: I don't recall. He had some conversations with Pete outside the hospital room. I think I was talking to Gregory. The two of them were together. He was a friend and neighbor of Mrs. DeConingh.

They had been on a friendly basis until he got in this part of it. He, basically, was saying that he wanted to get the record straightened out and to find out what had occurred.

Q: Do you recall him making a statement in front of Mrs. DeConingh that if he did give a statement it would be more beneficial to her than if she did not?

A: I can't say that I recall that with specificity.

Q: Drawing your attention to the 2nd of October '78 when you went to the hospital to see your client, the defendant, what was her condition when you went to the hospital room?

A: That was the first time?

Q: Yes, the first time.

A: She was quite sedated, but one of the problems was whatever they had been giving her--I talked to her doctor.

She was so hyper that it wasn't taking much effect. She was crying hysterical. She would talk a litle while, break down, make statements like she was talking to her husband. "I didn't mean to shoot you."

I think at that time, as I recall, this happened several times, so I do recall that, that she was in a very agitated emotional state.

Q: She was not coherent, then, was she?

A: I would say no.

Q: Looking back on the 2nd of October 1978, the day Roth advised her of her Constitutional rights, would it be your opinion she was rational or irrational on that particular date?

A: I would say she was irrational and would not understand exactly what was happening. That's why we terminated it right then that day.

Q: On that particular day, did you feel she had a mental capacity to understand her Constitutional rights?

A: No.

Q: Drawing your attention to the 4th of October 1978, that is, the second occasion when a statement was taken from her, do you recall her condition on that day in the hospital?

A: The same as it had been before. It hadn't improved any.

Q: It would be your opinion, then, on that particular day she did not have the mental understanding or ability to understand the consequences of what she was doing?

A: That would be right.

MR. DENARO: I have no further questions.

MR. BLUDWORTH: Nothing further. Thank you very much.

(The witness was excused.)

MR. DENARO: Defendant rests on the motion.

THE COURT: Does the State rest?

MR. BLUDWORTH: We have nothing further. State rests.

THE COURT: All right. Arguments.

MR. DENARO: It's my motion. I'll argue, Judge. I'll be very brief if I can gather my thoughts.

I think it's a two-fold argument. I would like to address the Court, one, on whether or not the defendant effectively waived her Constitutional rights. Of course, the classic case is the Miranda decision.

I'd like to bring to the Court's attention the cite on Miranda, 86 Supreme Court Reporter 1602 Supreme Court 1966. On Page 1630 it lays it out. I'm just doing that for the record. I'm sure the Court knows, but what is necessary on Miranda is not only must the defendant be

properly advised of her Constitutional rights, but, as well, she must have an understanding of it, knowing what her rights are. Then if she waives them, that waiver is freely and voluntarily made and she gives them up.

In this particular instance just on the Miranda argument and not going to her then existing state of mind, they advised her of her Constitutional rights on the 2nd day of October 1978.

A statement was not taken, or, if any statement was taken, it probably will not be used, but they didn't advise her or re-advise her of her Constitutional rights 48 hours later when they came back to see her in the hospital on the 4th of October.

The question now before the Court is whether her advice, the advising her of her rights on the 2nd of October was to

the benefit of the State on the 4th of October.

Quite frankly, I don't think there's any case in the United States that ever has failed if you advise the defendant on one particular day at one session of his Constitutional rights and wait a period of 48 hours, that the rights that were given to the defendant on day one would be applicable to the defendant on day two, that is, 48 hours later.

So, there was a complete failure to re-advise her of her Constitutional rights. All Lieutenant Roth told the Court is on the 4th of October before a statement was taken that attorneys were there. He just showed her the document and said that this particular document is still in effect.

That's one clear case of straight law, that the fact that they failed to advise her of her Constitutional rights

48 hours after the first time, that clearly shows the staement taken on that day is a violation of Miranda. But, more significantly, when Roth said this document here is still in effect, Judge, what was in effect? What actually did she do on the 2nd of October, 1978 to convince this Court she waived her Constitutional rights?

Their own witnesses, both attorneys that represented her, just recently testified under oath it was their opinion she had no understanding of her mental state, that it was such that she had no understanding of what her Constitutional rights were. She was of the state of mind sedated under drugs, yet, so uncontrollable that the drugs had no effect upon her because she was hysterical. They could not communicate with her. They are of the opinion she did not have the

mental ability to understand what her rights were, let alone waive them.

They were not there when she executed the rights form, only Roth was. She did not have the benefit of counsel to be advised of her Constitutional rights.

Roth's testimony, as I recall, he gave her the rights form, didn't read it to her. He let her read it. If the Court believes the testiony of the two attorneys that represented her, as well as the psychologist that testified, Sema McAninch, about her condition and her state, we know she did not have that then existing state of mind that an individual would have that would be able to compare them in normal affairs. She was under the influence of Thorazine, which is one of the most powerful drugs one can give to psychotics. It's a massive depressant drug that completely changes their personality. She had that drug three times

a day. To the best of my recollection, she was in the hospital for over two weeks. That in and of itself was the best evidence of her condition. She was not malingering. The police officer who came to see her part as a police officer and part as a friend simply gave her the rights form and let her read it herself in that particular condition. She then signed this document. This document was introduced before the Court and the Court needs only to look at her signature on the document that she signed regarding her sworn motion to dismiss to see her signature and compare it with that particular signature on the waiver of rights form to see the difference on how she signed her name and what condition she must have been in at that time.

In this particular case, I suggest she was of that state of mind on the 2nd of October because she was under the

influence of drugs and she was irrational according to the three witnesses who testified and she could not have understood what her Constitutional rights were, let alone conceptualize what they meant, understood them completely and waived them freely and voluntarily.

I suggest we have a picture on the 2nd of October of an individual who was not of normal state of mind, irrational, under the influence of drugs which were not having the actual effect they should have had, because she was in such hysteria, the attorneys that were there came to court and testified under oath there was no way she could understnd what was taking place.

If that's true, that she could not understand what was taking place, she could never have waived her Constitutional rights on the 2nd of October because of her condition and she was not

readvised on the 4th day of October of her Constitutional rights.

On two particular points I think the motion to suppress regarding the statement should be granted. One, she was not re-advised of her Constitutional rights on the 4th day of October 1978, the very day that she made the statement that the government wants to introduce to use against her.

Two, the day she executed this particular rights form, I think the preponderance of the evidence, the clear and convincing evidence is she ws not of a mental state in order to comprehend and waive what those rights were.

In addition, I think it's also significant that Mr. Lenzi came in and testified that Lieutenant Roth made the statement to him on the 4th of October, the day the massive statement was taken, that if she gave the statement, the statement

would be benefitical to her. We must remember that Roth came in to testify. He had known the defendant for a long time. He was her close friend, wasn't just a passing friend. He was her close friend, yet, when he came to her to take a statement on the 2nd of October and also on the 4th, he came as a police officer.

We all know too well when the Court listens to the testimony that it must be the testimony very, very critically to see what the circumstances really were.

I think we know he may have even been a police officer when he went to see her, but he went first as a friend. He admitted that, finally, on cross-examination that he greeted her as a friend. He said to Lenzi, "I want to do what's right by Suzanne and I think if she gave a statement it would be beneficial."

I think that is in the nature of a promise. When you compound that particular statement coming from the mouth of a man who's a very close friend of the defendant with Suzanne who kept on saying, even though she was under the influence of drugs and hysterical, she kept on saying that Roth was my close friend and I don't want him to think I killed my husband, whatever she said.

I think his presence as a police officer was not as a police officer, but as a friend in her mind given her then existing state of mind when she gave the statement.

I think when she heard the statement would beneficial and he was there as a friend, that that was a factor in her willingness to make a statement to the police.

So, on those points I argue this statement should be suppressed and I

think the government must refute this. She was not advised of her Constitutional rights on the 4th day of October 1978.

I suggest the only way they can rely that she waived her Constitutional rights on the record before us is to say she was effectively advised of her rights on the 2nd day of October. I think the hiatus is too long, 48 hours. I don't think there's any case in the country that supports the position if you advise on day one and two days expire, the rights that were given on day one are still in effect on day two.

I think the best example is if a person comes before a magistrate on first appearance, the rules require he be advised of his Constitutional rights.

And three days after he was advised by the magistrate a police officer went to the jail and took a statement, would the government then come in to be heard

because he was advised of his Constitutional rights by a judge three days before that statement was given? Would they come in and say that would be a waiver of Miranda? I think not. I think that hiatus is critical and fatal to the government's case.

To compound it is the fact that the overwhelming evidence--and they are bound by their witnesses. They called Cunningham and Lenzi. They have to live with that testimony. Each man testified that on the 2nd and on the 4th she was in no condition to understand what her rights were, let alone act upon them.

That would be my argument on the motion to suppress.

MR. BLUDWORTH: Judge, in response to this, I think, correctly, the test is the totality of circumstances as to whether or not the statement was given after the threshold requirement of Miranda was

made. All Miranda says is that they should be advised of their rights fairly. That's all Miranda did.

It said, look, we're going to create a threshold for all the people in law enforcement. The threshold is you've got to show us that you advised that person of their right to counsel. I think it's clear for the record that not only was she advised of the right to counsel and signed that, but she got counsel.

She actually had two of the finest criminal lawyers, perhaps, in Monroe County, a former state attorney, representing her and counseling with her.

There are cases I will submit to the Court, and I should have brought them, to say exactly what we're arguing.

Our second point is that the defendant has to be re-advised. There are cases, and I will provide that to the Court, that say once advised, that police

officer doesn't have to go back and re-advice when a defendant wants to make a statement.

There was no inducement. Nothing has been shown here so there was any inducement. This defendant, Suzanne DeConingh, wanted to tell what happened. With two very fine criminal lawyers present having had advised her, she made a statement. Now we have the unusual argument that I, you know, have trouble following.

To come back and depend on the idea that what my good lawyers advised me to do, whether I followed it or not, should be inadmissible against me because it may or may not, depending on how the jury accepts the statement, it could be looked at as, perhaps, it's culpatory.

It would be a new and novel new position if we were to suppress the statement, for whatever it is, on some

basis, because it's really now the Judge's responsibility to determine from the totality of the circumstances whether or not she had, first, the threshold, and that she had her lawyers.

The question is whether or not the weight to be given the statement, all the evidence in the statements are true because she didn't know what she was saying. These things, I assume, Mr. Denaro can argue to the jury after the jury has heard the statements. But I clearly think this case is one which speaks out for the admissibility on every thing that I've read. I should have brought the cases with me, and I will furnish them to the Court.

The re-advising of the rights, there's no problem here about re-advising, really, even though it's not required, because she had her lawyers there. She had her lawyers present in

the room. They talked to her before she made the statement.

I think that's the argument. Those are the two points. I don't think there's any question. The Court can enter an order about the voluntariness of this confession reciting facts she did get counsel. Counsel was present when she gave a statement. The weight, that's up to the jury.

If he wants to argue she didn't know what she was saying, that's not correct, but that's something that can be brought for the weight of the jury, which is the jury's perogative, to choose after they hear that how much weight to put on it. The tape should be allowed to be admitted in this trial.

MR. DENARO: If the State has finished, if I could just respond, case law in this area is that the government has a heavy burden to show that there was

a waiver of Constitutional rights. That's clean and that's clear law.

In this particular instance, there is no evidence in the record presented by the government, the State of Florida, to indicate that her state of mind was anything apart from the way these two attorneys and Sema McAninch describes.

An insane person can make a statement, and someone may say, well, because he made the statement, it was free and voluntary. Otherwise, it never would have been done. It even goes--the issue we're dealing with now is whether the statement was given freely and voluntarily. It's about competency, mental competency to be in a position to be free and voluntary and understanding what you're doing. We're at a base level here on competency.

Three witnesses in this particular case testified. Two of them were the

government's witnesses that said she could not understand what her rights were and did not understand what she was doing. That's unrebutted. This record is complete. It's unrebutted as to that particular fact.

The government states that the finest attorneys in Monroe County represented her. Yes, the finest attorneys in Monroe County came in here and said with all my experience this woman did not kn ow what she was doing, could not follow my advice because she was out of her mind.

"The finest attorneys in Monroe County," that's his own words. They're the ones who testified--they were his own witnesses who testified to her then existing state of mind.

Lastly, and most importantly, there will be no rebuttal as to whether or not

she had to be advised on her Constitutional rights the second time. There will be no case that will come into this particular court that will say that the advice two days before is good for two days thereafter. Otherwise, a person could be advised of his Constitutional rights and that does it for a week. That's not the position of law.

I think on all points from the evidence considered there is no evidence that they have presented to contradict her then existing state of mind. In fact, if they had any evidence and presented it, then the Court would say, well, I think, you know, possibly I think I'll rule with the State in this case that she may not have been insane in this particular instance. She may not be irrational. They didn't offer any one person to rebut that then existing state of mind.

To the contrary, their own witnesses were the strongest witnesses for the defense in this particular case.

On those particular grounds, I would request that the motion to suppress be granted.

MR. BLUDWORTH: I have no rebuttal.

THE COURT: The Court finds that the argument of counsel for the defendant are supported by the facts and the motion to suppress is granted.

MR. BLUDWORTH: Judge, would you enter a written order, please? The State has a right to appeal.

THE COURT: I sure will.

MR. BLUDWORTH: Based on that, Judge, the State is going to have to look at the case to see whether we're going to pursue the interlocutory appeal and whether we want to proceed on the 19th without the benefit of having the statement in evidence.

I am not prepared to tell the court what the State is going to do until we see the written order.

THE COURT: The Court's decision in this case is based substantially on the arguments as made by Mr. Denaro. First of all, the Court finds that at the interrogation of October the 4th the defendant at that time should have been re-advised fully and ocmpletely of her rights, of her Constitutional rights, that is; and that merely the waiving of the paper and saying, "Did you realize this is still in effect," that is not sufficient.

The other things, of course, is from the time and the factual basis as presented to the Court, it is overwhelmingly clear that a condition, both physical and mental, of the defendant at that time--physical, in the sense she was under the

Thorazine medication that she had received and mental as a result of the incident that occurred, and the supported testimony of Mr. Cunningham, Mr. Lenzi and Sema McAninch, I find that the defendant was not aware of what she was doing or what was going on. It was not sufficient, at least, for purposes of the Court saying she understood fully what she was doing by waiving her rights.

MR. BLUDWORTH: I'd like to have that in writing, Judge.

THE COURT: All right.

MR. BLUDWORTH: You will give us a written order. In light of the time, as I say, I'm not prepared to tell the Court whether I'm going to proceed to interlocutory appeal or proceed without that statement. I've got to think about it because you have just ruled.

I would say, though, that we would, if we do, after seeing the written order-

we're talking about next week. As soon as I receive the order, I'll have a chance to think about this and make an appropriate decision. I will notify the Court if I decide to file the appropriate interlocutory appeal papers, if that's our decision to do it.

We would then, of course, want to toll the statute of limitation speedy trial for the purposes of the appeal. I would indicate to the Court I'm probably going to appeal.

THE COURT: That's quite all right. That wouldn't be the first time I've been appealed.

MR. DENARO: Before the Court adjourns--

THE COURT: (Interposing) I was going to say that it would expedite things, because I don't kow when I will get to this, it would expedite things if you would submit to me a proposed order

in accordance with the arguments that you just made. It's not thta I will enter that order, but it will make things easier for me.

Then, I can go over it and change it as it suits me in accordance to what I want to find in the order. It will help out a lot if you submit a proposed order.

MR. DENARO: Before the Court adjourns, when I was--

MR. BLUDWORTH: (Interposing) A couple of points. Did he admit the waiver?

THE COURT: This is not an order you're going to submit for his approval. You understand that, I hope. This is only to assist me in preparing my own order.

MR. BLUDWORTH: We would like to admit for exhibits marked for hearing purposes the two statements.

THE COURT: Now just a moment. I don't know what your procedure is. I have not admitted anything into evidence. I've had two documents that were marked for identification only. I don't recall anything being offered into evidence. I don't recall ruling anything was admitted into evidence.

MR. BLUDWORTH: I would like to ask that the hearing be reopened for purposes of including the documents which were put into the original, in the first hearing on this motion with the tape, the original in the first hearing held before Judge Chappell--

THE COURT: (Interposing) No. Now wait a minute. Let's clarify something. I said at the very beginning I was not aware of anything done by Judge Chappell, that we would commence this hearing de novo.

MR. BLUDWORTH: That's correct. I'm asking to reopen the hearing for purposes of admitting what the defendant marked and what you gave copies of for the purpose of this hearing to complete the record.

MR. DENARO: I would object because I had that marked as Defendant's Exhibit to get certain testimony in. I deliberately did not offer that into evidence. I did so deliberately not offer it into evidence. That's why it was not offered into evidence.

I used it to refresh this particular individual, whoever was testifying about it. I would object that the matter be reopened and the documents be offered into evidence that I have marked for identification and showed to a witness. It wasn't done by the government. They never chose to offer it into evidence and we closed.

There was an argument on the matter and certain things that were said in the argument, otherwise, I would be at a disadvantage. It might make for a judgment of acquittal.

If I come to the Judge and tell him everything I think is wrong and the government comes by and says, wait, I want to open that case, that defeats the purpose of the motion for judgment of acquittal and defeats the whole purpose of closing argument.

It would be better for any attorney not to edify the Court as to what he believes the state of law to be and wait for an appeal. I don't think that's what our judicial system is about.

When all the evidence is in, we both go to the Court and make argument and the Court rules. That's the end of the matter.

THE COURT: I'm sorry, Mr. Bludworth.

MR. DENARO: If the Court--

THE COURT: (Interposing) I'm sorry. I think it's too late to open the case. Both sides have rested. We've had argument. The Court has rendered its ruling.

Now you're asking me to go back and reopen the case. I don't think I can do that.

MR. BLUDWORTH: I think in the interest of justice we're going to have a full look at your rulings, the appellate court is. It would be in the best interest of justice to have a copy of the advice of rights since that has been testified to. I feel it should be made available for the appellate court to look at. Of course, it's your ruling and we'll abide by that. It's my request. You're the judge.

THE COURT: Well, if it had been before argaument and the rendering of the Court's ruling, I would have allowed it. But after the argument and after the rendering of the decision by the Court, I think I'll have to deny it.

MR. BLUDWORTH: Thank you, Your Honor.

MR. DENARO: Before the Court adjourns, I was told by Mr. Denker I would have to file a witness list by the 9th of May. I've seen a witness list in the file. What I did do was I prepared every witness I could think of in this particular case and also indicated those that might be relied upon for psychiatric examination, for psychiatric defense. I would like to file this witness list.

In addition, I also prepared yesterday a motion to suppress evidence, unlawful seizure of blood. I was just getting involved in the case.

MR. BLUDWORTH: Do you anticipate setting a hearing down for the motion to suppress the blood, Judge?

MR. DENARO: It's not going to be long. This needed a whole day. I think if we're going to do that, we could take it before trial, if necessary. I can't see wasting more than an hour.

MR. BLUDWORTH: The State wants to object. We want to hear it properly. We have a right to appeal, as we may exercise here. We've got a case that's two years old.

If the judge in that case is going to suppress the blood, the State may want to appeal that. I think we ought to set a hearing time.

THE COURT: The motion has been filed. Either one of you can request a hearing time.

MR. DENARO: Would next Friday be convenient?

MR. BLUDWORTH: I don't know.

MR. DENARO: Maybe we can get together.

THE COURT: We may have a problem hearing it next Friday. Next week is my regular jury trial week.

MR. BLUDWORTH: We'll set a time for it. If we're not going to go to trial if the State appeals this, maybe we would be able to take some time during that week that we're set for trial, the week of the 19th. It's probably a reasonable good chance we're going to appeal.

THE COURT: I sort of expected an appeal regardless of which way it went.

MR. BLUDWORTH: They don't have a right to appeal.

THE COURT: That's true. The State does.

MR. BLUDWORTH: The State does.

THE COURT: All right. That will be all. (The hearing was adjourned at 5:00 p.m.)

NO. 83-383

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-383

THE STATE OF FLORIDA,

Petitioner,

vs.

SUZANNE DECONINGH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Respondent represents to the Court as follows:

1. The instant cause is moot.

The State of Florida initiated appellate proceedings from a pretrial order which suppressed respondent's statements to local police. On September 16, 1981, while discretionary review proceedings were pending in the Supreme Court of

Florida, the respondent entered a negotiated guilty plea to a reduced charge and was placed on probation. This absence of a viable case or controversy deprives this Court of jurisdiction to review the decision of the Supreme Court of Florida. J. Aron & Company v. Mississippi Shipping Company, 361 U.S. 115 (1959) (per curiam).

2. The decision below is based upon independent, adequate state grounds.

The decision below of the Supreme Court of Florida was bottomed on its view that "...the trial court had a proper factual basis to find that DeConingh had made her statement neither knowingly nor voluntarily" (App. p. 13). Because the record supported the trial court's factual finding, the Supreme Court of Florida quashed the adverse opinion of the intermediate appellate court (App. p. 14). According to the Supreme Court of Florida:

> The trial court, is spite of the actions of both the deputy and DeConingh, preserved her right not to be compelled to be a witness against herself. Article I, §9, Fla. Const.

(App. pp. 11-12). This reliance upon the state constitution clearly constitutes an independent, adequate state ground upon which the decision below rested. See, Wilson v. Loew's Inc., 355 U.S. 597 (1958); Fox Film Corp. v. Muller, 296 U.S. 207 (1935).

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

KURT MARMAR